Supreme Court, U.S.
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No. 06- 06-57

IN THE

Supreme Court of the United States

RUSSELL PENNOCK and ANTOINETTE PENNOCK, in their individual capacities and on behalf of the ESTATE OF DANIEL PENNOCK,

Petitioners,

v.

RICHARD V. LENZI and CARMINE D. LENZI, in their individual capacities and dba Ridge Crest Farms, MELVIN C. GELSINGER, GALE GELSINGER, ESTHER GELSINGER, CLARENCE D. GELSINGER, RETTEW ASSOCIATES, INC., BERKS COUNTY CONSERVATION DISTRICT and the COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In parents' wrongful death and survival case under state law, does a statute of limitations that extinguishes the parents' claims before they knew or could have known who caused the infections that killed their son violate their Due Process, Equal Protection, or Privileges and Immunities rights under the Fourteenth Amendment?

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OPINIONS BELOW

The initial opinions of the Court of Common Pleas of Dauphin County dated October 14, 2003, and June 30, 2004, are not reported. They appear in Appendix C and B, respectively. The opinion of the Commonwealth Court of Pennsylvania dated September 15, 2005, affirming the lower court, is reported at *Pennock v. Lenzi*, 882 A.2d 1057 (Pa. Cmwlth. 2005), and appears in Appendix A. The order of the Supreme Court of Pennsylvania denying petitioners' petition for allowance of appeal (which is the procedure for discretionary review in Pennsylvania) is reported at *Pennock v. Lenzi*, 897 A.2d 462 (Table) (Pa. 2006), and appears in Appendix D.

STATEMENT OF JURISDICTION

The basis for jurisdiction in this Court is 28 U.S.C. § 1257.

The opinion and order of the Commonwealth Court of Pennsylvania for which review is sought was entered on September 15, 2005. (App. A.) The Supreme Court of Pennsylvania denied petitioners' petition for allowance of appeal (the procedure for discretionary review in Pennsylvania) by order entered April 19, 2006. (App. D.)

As the Pennsylvania Department of Environmental Protection is a party to this matter, notice is not required under Rule 29.4(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., Amend XIV, section 1, clause 2

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, Pennsylvania Consolidated Statutes, section 5524(2)

Limitation of Time; Civil Actions and Proceedings; Two year limit

The following actions and proceedings must be commenced within two years:

> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

Title 42, Pennsylvania Consolidated Statutes, section 5502(a)

Limitation of Time; General Provisions; Method of computing periods of limitation generally

The time within which a matter must be commenced under this chapter shall be computed . . . from the time the cause of action accrued.

STATEMENT OF THE CASE[1]

On April 1, 1995, we watched as our son Danny flatlined in a Reading, Pennsylvania, hospital bed.[2] Two weeks prior, Danny had been a healthy teenager playing basketball in our backyard.

It is bad enough when parents are forced to watch their children die before their eyes from causes that are known. It is worse when a child sickens from an unknown cause, and parents are forced to watch helplessly as their child struggles to survive without knowing how to help or even whom to hold accountable.

The doctors told us that our son died from staphylococcus aurea and rotavirus infections. Despite having an attorney review our son's records, it was not until February 2001 that we learned those infections could be caused by land applied sewage sludge, a substance that had been spread on farmland across the street from our home in Robesonia, Berks County, Pennsylvania, for seven years leading up to Danny's death.

When we attempted to hold people and agencies accountable for the death of our son by filing a wrongful death lawsuit in Pennsylvania courts within two years after

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1. Because this case involves the death of their son, and because this Court is their last resort for justice, Russell and Antoinette Pennock have chosen to author the Statement of the Case as a first-person narrative.

2. The Complaint in this case was dismissed on preliminary objections. Hence, this rendition of the facts comes primarily from the Complaint, which the Courts were bound to accept as true in ruling on preliminary objections.

learning the cause of Danny's death, we were told that we were barred from filing our suit by the statute of limitations. We were told that we were prohibited from filing suit *even though we could not have filed a lawsuit within the statute of limitations.*

The question in this case is whether we have a constitutional right to file this wrongful death and survival suit within the statutory time period from when we knew or should have known the culprit, or causation, in Danny's death.

We have learned more than we ever wanted to know about sewage sludge during the last five years. We have learned that sewage sludge is the liquid and solid sludge and residue produced by municipal sewage collection and treatment systems and from septic and holding tank pumpings from commercial, industrial, and residential establishments. 25 Pa. Code § 271.1. In short, sewage sludge is everything that is flushed down toilets in homes, businesses, hospitals, and industrial facilities. For years, the United States disposed of sludge by dumping it in coastal waters. After discovering that this practice was killing marine life, the U.S. Environmental Protection Agency (EPA) designed a "beneficial use" program that allows sludge to be spread on farmland where food is grown. 40 C.F.R. Part 503. Some sewage sludge is treated by adding lime that is supposed to reduce deadly pathogens in sludge.

In Pennsylvania, the sewage sludge program is administered by the respondent Department of Environmental Protection (DEP), and in our hometown by the respondent Berks County Conservation District. In September 1987, respondents Richard and Carmine Lenzi, doing business as

Ridge Crest Farms, received a permit from DEP to spread sewage sludge on farmland owned and operated by respondents Melvin, Gale, Esther, and Clarence Gelsinger. The farmland is across the street from our house, and the Lenzis spread sludge there from 1988 until around Danny's death in April 1995. Respondent Rettew Associates is an engineering firm that the Lenzis hired to oversee the sludge spreading process conducted by Ridge Crest Farms and the spreading of sludge at the Gelsinger farms.

Pennsylvania regulations and the Lenzis' permits required respondents to mark land that was receiving sludge with "physical markers, such as survey flags," to notify neighbors thirty days in advance of land application, and to restrict public access to sludged land for thirty days after application. Respondents violated each of these regulations during their seven-year sludging program at Gelsinger farm. Respondents never marked land being sludged. They failed to notify us prior to each land application. They failed to restrict our access to sludged land. In fact, respondents allowed Russell and our sons, Danny and Dario, to hunt on sludged land without warning us that the land had been sludged and without informing us that sludge can contain deadly pathogens.

On March 15, 1995, Danny was our healthy 17-year-old son playing basketball at home. The next day he noticed the first symptoms of an illness that hospitalized him on March 19. Cultures taken by the intensive care unit that day revealed that Danny had a staph infection. He also had a rotavirus infection. Danny was ultimately intubated due to his difficulty in breathing caused by perforations that had developed in his lungs as a result of the staph infection. On April 1, 1995, our son died.

For almost six years following Danny's death, we had no idea how he had contracted the infections that killed him. We did not know, and could not have known, who and what were responsible for the death of our son.

On February 25, 2001, a daily newspaper called the *Reading Eagle* published an article on the topic of sewage sludge and whether its application to farm fields as fertilizer is properly regulated and safe. The article contained opinions and analysis by former EPA microbiologist Dr. David L. Lewis on the pathogens found in sewage sludge. The article also described the illness and death of an 11-year-old boy, Tony Behun, who died in 1994 after exposure to sewage sludge in Rush Township, Centre County, Pennsylvania.

After reading that article, we contacted Dr. Lewis, who reviewed Danny's medical records and determined that the rotavirus and staph infections found in Danny were contracted from his prolonged exposure to the dust and fumes emitted from the pathogens in sewage sludge. According to Dr. Lewis, "the lime stabilization process used to treat Class B sewage sludge prior to land application has the effect of, when the lime dust is inhaled, opening and exposing an individual's lungs in the mucus membrane and the mouth and throat areas so that the individual is more susceptible to these pathogens. As a result, skin and respiratory problems develop, such as skin irritation, difficulty in breathing, congestion, burning lungs, coughing and sinusitis, and from these, the infections occur." As we learned, staph and rotavirus infections contracted from sewage sludge can cause death.[3]

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3. After a distinguished thirty-one year career with EPA, Dr. Lewis was fired in May 2003 for his published, peer-reviewed concerns about the sewage sludge program.

On behalf of Danny, we filed our wrongful death lawsuit in the Dauphin County Court of Common Pleas on February 21, 2003, less than two years after publication of the newspaper article that led us to sewage sludge as the culprit in Danny's death. In the Complaint, we preserved our argument that the discovery rule tolled the statute of limitation by alleging, "Plaintiffs first became aware of the dangers associated with exposure to sewage sludge in February of 2001" and, "It was from Dr. Lewis' analysis and the reported symptoms experienced by Tony Behun that the Plaintiffs first became aware of the link between sewage sludge and their son's death."

In the Court of Common Pleas, some of the respondents filed preliminary objections to dismiss our Complaint under the two-year statute of limitations for wrongful death and personal injury claims:

> The following actions and proceedings must be commenced within two years:
>
> > (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

42 Pa.C.S.A. § 5524(2).

> The time within which a matter must be commenced under this chapter shall be computed . . . from the time the cause of action accrued.

42 Pa.C.S.A. § 5502(a).

In our brief and oral argument in opposition to dismissal, we asserted that barring us from the courthouse before we knew or could have known the culprit in, or causation of, Danny's deadly infections violated our rights under the Fourteenth Amendment (and under state constitutional rights not at issue before this Court). The brief specifically contained arguments headed: "Denying the Plaintiffs the Protection of the Discovery Rule Violates the . . . Privileges and Immunities Clause of the U.S. Constitution"; "Denying the Plaintiffs the Protection of the Discovery Rule Violates the Equal Protection Clause of the U.S. . . . Constitution"; and "Denying the Plaintiffs the Protection of the Discovery Rule Violates the Due Process Clause of the U.S. . . . Constitution."

By order and opinion of October 14, 2003 (*see* App. C at 26a–27a), the Court of Common Pleas dismissed our Complaint against Ridge Crest Farms, the Lenzis, the Gelsingers, and the Berks County Conservation District on the ground that our wrongful death and survival claims were barred under the two-year statute of limitations. Relying on *Pastierik v. Duquesne Light Co.*, 526 A.2d 323 (Pa. 1987), the court rejected our assertion that under the discovery rule, the statute was tolled until we reasonably could have discovered the cause.

In *Pastierik*, the Supreme Court of Pennsylvania held that the discovery rule may not extend the time for bringing wrongful death and survival actions beyond two years after death. The Court made this ruling despite the fact that it applies the discovery rule to claims for personal injury under precisely the same statute of limitation that applies to wrongful death and survival claims. 42 Pa.C.S.A. § 5524(2);

Fine v. Checcio, 870 A.2d 850 (Pa. 2005). *Hence, if Danny had lived, he could have sued after February 2001 under the benefit of the discovery rule, but since he died, wrongful death and survival claims stemming from the same misconduct are barred.*

By order and opinion of June 30, 2004 (*see* App. B), the Court of Common Pleas dismissed our Complaint against Rettew Associates for failure to state a claim. In its opinion, the court denied our request for leave to amend against Rettew, reasoning that amendment would be futile in light of the Court's prior ruling that the statute of limitations barred the claims against other defendants (*see* App. B. at 24a–25a).

The court's rulings left the Complaint unresolved with respect to respondent DEP. However, based on our stipulation that we would voluntarily dismiss DEP if the statute of limitations ruling withstood appeal, the Court of Common Pleas entered a determination of finality on July 26, 2004, making the Court's prior rulings final, appealable judgments on that date.

We appealed as a matter of right to the Commonwealth Court of Pennsylvania. In our brief, we again asserted that extinguishing our claims before we knew, or could have known, the culprit violated our rights under the Fourteenth Amendment. Hence our first statement of question involved was, "Does extinguishment of wrongful death and survival claims before plaintiffs could discover the culprits violate . . . the Privileges and Immunities, Due Process, or Equal Protection Clauses of the U.S. Constitution?"

By order and opinion of September 15, 2005 (*see* App. A), the Commonwealth Court affirmed, rejecting our argument that the statute of limitations as applied violated our constitutional rights under the Fourteenth Amendment. *Pennock v. Lenzi*, 882 A.2d 1057 (Pa.Cmwlth. 2005). The Court held: "we conclude that the statute passes constitutional muster under . . . the [Equal Protection Clause of the] Fourteenth Amendment" (App. A at 14a); "the Pennocks' state and federal due process claims fail for the same reasons" (App. A at 14a); "We also must reject plaintiffs' argument that *Pastierik* violates the privileges and immunities clause of the United States Constitution" (App. A at 15a); and "Accordingly, we see no constitutional error in common pleas' application of *Pastierik* to the present case" (App. A at 16a).

We filed a petition for allowance of appeal with the Supreme Court of Pennsylvania. By order of April 19, 2006 (*see* App. D), the Court denied our petition, exercising its discretion to decline to review the case. *Pennock v. Lenzi*, 897 A.2d 462 (Table) (Pa. 2006). Now, in our last chance for justice in Danny's death, we seek discretionary review by this Honorable Court.

REASONS FOR ALLOWANCE OF THE PETITION

The Commonwealth Court of Pennsylvania has decided an important federal question of constitutional law that has not been, but should be, settled by this Court: does the Fourteenth Amendment require states to apply the discovery rule to the statute of limitations when the plaintiff could not,

with the exercise of reasonable diligence, know the facts of both injury and causation within the statutory time limit?[4]

I. Review Is Warranted to Settle Whether Extinguishing Claims under a Statute of Limitations without the Discovery Rule Violates Due Process by Failing to Provide a Meaningful Opportunity to Sue

There is no doubt under this Court's jurisprudence that a state statute of limitations satisfies the Due Process Clause of the Fourteenth Amendment if it provides a "meaningful time" to present a claim in a "meaningful manner," *Logan v. Zimmerman*, 455 U.S. 422, 437 (1982), and if it provides a "reasonable time" in which to bring a lawsuit, *Atchafalaya Land Co. v. F.B. Williams Cypress Co.*, 258 U.S. 190, 196–97 (1922).

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4. The Supreme Court of Pennsylvania has not specifically addressed whether extinguishing claims without application of the discovery rule violates the federal Constitution. Waiting for it to do so before granting certiorari, however, will prevent this Court from ever addressing this important federal question. The Supreme Court of Pennsylvania denied review of the Commonwealth Court's decision here. Meanwhile, the Commonwealth Court said, "we flatly reject the notion that in deciding . . . *Pastierik* our Supreme Court was unmindful of its obligation to interpret statutory law in accordance with constitutional mandates" (App. A at 7a). Furthermore, in the nineteen years since *Pastierik* was decided, the General Assembly of Pennsylvania has not acted to amend the statute of limitations to alter the Supreme Court's dichotomous interpretation of the uniform language that applies to personal injury, wrongful death, and survival claims alike. Hence, the judicial and legislative systems of Pennsylvania consider settled the question whether extinguishing claims without application of the discovery rule violates the federal Constitution. After nineteen years, the issue is overripe for consideration by this Court.

It is equally clear, however, that the Court has never addressed the constitutionality of state statutes of limitation when the claimants did not know, and could not have known, the facts of both injury and causation within the statutory time limit. *See, e.g., United States v. Kubrick*, 444 U.S. 111 (1979) (holding that accrual of a cause of action under the Federal Tort Claims Act happens when the plaintiff knew or should have known the facts of both injury and causation). Stated another way, this Court has never addressed whether the Fourteenth Amendment entitles litigants to the tolling period of the discovery rule in the application of a statute of limitations.

This is an important federal question because it involves the fundamental right of access to the courts. In *Chambers v. Baltimore & O.R. Co.*, the Court said the right of access to state courts "is one of the highest and most essential privileges" of state citizenship. 207 U.S. 142, 148 (1907); *see also Bill Johnson's Restaurants., Inc., v. N.L.R.B.*, 461 U.S. 731, 741 (1983) ("the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances"); *United Mineworkers of America v. Illinois State Bar Ass'n.*, 389 U.S. 217 (1967) (right to petition government for state unemployment compensation claims protected by Fourteenth Amendment). This means the right of access to state courts is a fundamental right, so any infringement of the right must satisfy strict scrutiny under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[5]

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5. In dictum in *Parham v. Hughes*, the Court said, "It cannot seriously be argued that a statutory entitlement to sue for the wrongful death of another is itself a 'fundamental' or constitutional right." 441 U.S. 347, 358 n. 12 (1979). Petitioners here do not intend to make the narrow argument that a wrongful death claim is a fundamental right, but rather the broader argument that the right of access to the courts for all legitimate claims is fundamental.

See Clark v. Jeter, 486 U.S. 456, 461 (1988) (statutory "classifications affecting fundamental rights . . . are given the most exacting scrutiny").

Whether a statute of limitations that extinguishes claims before the claimants could have known whom to sue infringes the fundamental right of access in a manner that violates the Due Process Clause is a federal question yet unanswered, and worthy of being settled, by this Court.[6] Under either strict scrutiny or rational basis review, whether the "opportunity" to sue is "meaningful" when the claimants are

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6. In *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945), this Court said that the shelter of a statute of limitations is not a fundamental right of a defendant, so that claims may be revived after statutory extinguishment without offending due process: "Their shelter [that of statutes of limitations] has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual." Courts nationwide have misconstrued this language to hold that statutes of limitation do not implicate fundamental rights of plaintiffs, including the fundamental right of access to the courts. *See, e.g., Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 555 (3rd Cir. 1985). Clearing up this misconstruction of *Chase Securities* is another reason review is important, as the Commonwealth Court below specifically relied upon the *Ciccarelli* court's misconstruction of *Chase Securities* in rejecting the Pennocks' constitutional arguments (*see* App. A at 7a–9a). Indeed, the Commonwealth Court itself committed the error of misconstruing *Chase Securities* by relying on the above quotation divorced from the context of the decision (*see* App. A at 15a). The same problem stems from the Commonwealth Court's reliance on state cases such as *Agostin v. Pittsburgh Steel Foundry Corp.*, 47 A.2d 680 (Pa. 1946) (*see* App. A at 14a–15a), which involved whether changing a statute of limitations in a way that favored the plaintiff violated any constitutional rights of the defendant, not whether a statute of limitations can infringe a plaintiff's fundamental right of access to the courts.

blamelessly ignorant of whom to sue during the statutory period is a question worthy of being settled by this Court. *See, e.g., Bodie v. Connecticut*, 401 U.S. 371, 377 (1971) ("due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard"); *Logan v. Zimmerman*, 455 U.S. 422, 437 (1982) ("The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations. . . . What the Fourteenth Amendment does require, however, 'is 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner,' . . . 'for [a] hearing appropriate to the nature of the case.' "); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (due process requires opportunity to be heard "at a meaningful time and in a meaningful manner").[7]

7. States are split on whether extinguishing claims without the benefit of the discovery rule violates due process. *Compare Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alas. 2002) (ten-year statute of repose for personal injury, death, and property damage did not violate due process), *Harlfinger v. Martin*, 754 N.E.2d 63 (Mass. 2001) (seven-year statute of repose for medical malpractice actions did not violate due process), *Aicher v. Wisconsin Patients Compensation Fund*, 613 N.W.2d 849 (Wis. 2000) (five-year statute of repose for medical malpractice claims did not violate due process), *Garcia v. La Farge*, 893 P.2d 428 (N.M. 1995) (three-year statute of limitations for medical malpractice, without discovery rule, did not violate due process), *Musk v. Nelson*, 647 A.2d 1198 (Me. 1994) (medical malpractice statute of limitations that applied discovery rule only in foreign-object cases did not violate due process), *CLL Associates Ltd. v. Arrowhead Pacific Corp.*, 497 N.W.2d 115 (Wis. 1993) (statute of limitations that extinguished breach of contract action prior to discovery did not violate due process), *Hoffman v. Powell*, 380 S.E.2d

(Cont'd)

II. Review is Warranted to Settle Whether Interpreting a Uniform Statute of Limitations to Afford the Discovery Rule to Personal Injury Plaintiffs But Not to Wrongful Death and Survival Claimants Violates Equal Protection

A state statute of limitations that does not implicate a fundamental right satisfies the Equal Protection Clause of the Fourteenth Amendment if there is a rational basis for the distinction the statute makes. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). As covered above, however, it is arguable that extinguishing claims without the benefit of the discovery rule infringes the fundamental right of access to the courts, triggering strict scrutiny.

Whether judicial activists, interpreting a uniform statute of limitations, infringe the right of access in a manner that violates the Equal Protection Clause by applying the statute

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(Cont'd)

821 (S.C. 1989) (six-year statute of repose for medical malpractice claims did not violate due process), *Crier v. Whitecloud*, 496 So.2d 305 (La. 1986) (three-year statute of limitation for medical malpractice without discovery rule did not violate due process), and *Anderson v. Wagner*, 402 N.E.2d 560 (Ill. 1979) (four-year statute of limitations for medical malpractice without discovery rule did not violate due process), *with Burgess v. Eli Lilly & Co.*, 609 N.E.2d 140 (Ohio 1993) (statute of limitations that extinguished diethylstilbestrol (DES) claims before plaintiff was fully aware of injury violated due process), and *Lillicrap v. Martin*, 591 A.2d 41 (Vt. 1989) (personal injury action that had vested could not be extinguished prior to discovery by after-enacted statute of repose without violating due process). *See also Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984) (two-year statute of limitations for medical malpractice without discovery rule violates state constitutional open courts provision, which makes access to courts a fundamental right).

one way for personal injury claims (allowing the discovery rule to toll the limitations period) yet applying it a different way for wrongful death and survival claims (disallowing the discovery rule) is a federal question yet unanswered, and worthy of being settled, by this Court. *See, e.g., Clark v. Jeter*, 486 U.S. 456 (1988) (six-year statute of limitations for paternity actions violated equal protection under intermediate scrutiny because state allowed issue of paternity to be litigated more than six years after birth in other circumstances).[8]

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8. States are split on whether extinguishing claims without the benefit of the discovery rule violates equal protection. *Compare Hoffner v. Johnson*, 660 N.W.2d 909 (N.D. 2003) (six-year statute of repose for medical malpractice without benefit of the discovery rule did not violate equal protection), *Aicher v. Wisconsin Patients Compensation Fund*, 613 N.W.2d 849 (Wis. 2000) (five-year statute of repose for medical malpractice claims did not violate due process), *Albright v. White*, 503 S.E.2d 860 (W.Va. 1998) (twenty-year statute of limitations, without discovery rule, for injuries suffered as minor did not violate equal protection), *Adams v. Arthur*, 969 S.W.2d 598 (Ark. 1998) (two-year statute of limitations for medical malpractice did not violate equal protection), *Bonin v. Vannaman*, 929 P.2d 754 (Kan. 1996) (eight-year statute of repose for claims of persons under disability did not violate equal protection), *Garcia v. La Farge*, 893 P.2d 428 (N.M. 1995) (three-year statute of limitations for medical malpractice, without discovery rule, did not violate equal protection), *Musk v. Nelson*, 647 A.2d 1198 (Me. 1994) (medical malpractice statute of limitations that applied discovery rule only in foreign-object cases did not violate due process), *Craven v. Lowndes County Hosp. Auth.*, 437 S.E.2d 308 (Ga. 1993) (five-year statute of repose for medical malpractice did not violate equal protection), *Hawley v. Green*, 788 P.2d 1321 (Idaho 1990) (four-year statute of limitations for medical malpractice that allowed discovery rule only for foreign-object cases did not violate equal protection), *Hoffman v. Powell*, 380 S.E.2d 821 (S.C. 1989) (six-year statute of repose for medical

(Cont'd)

(Cont'd)

malpractice claims did not violate equal protection), *Cole v. Delaware League for Planned Parenthood*, 530 A.2d 1119 (Del. 1987) (medical malpractice statute of limitations that extinguished claims of 17-year-old prior to discovery but tolled claims of minors under six for longer period did not violate equal protection), *Crier v. Whitecloud*, 496 So.2d 305 (La. 1986) (three-year statute of limitation for medical malpractice without discovery rule did not violate equal protection), *and Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978) (three-year statute of repose for medical malpractice that abrogated discovery rule that otherwise applied to personal injury actions did not violate equal protection), *with Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999) (statute of limitations that extends discovery rule to all tort victims except victims of medical malpractice violates state constitutional privileges and immunities clause, which mirrors equal protection); *DeYoung v. Providence Medical Center*, 960 P.2d 919 (Wash. 1998) (eight-year statute of repose for medical malpractice actions violated state privileges and immunities clause, which mirrors federal equal protection clause), *Whitlow v. Board of Educ. of Kanawha Cty.*, 438 S.E.2d 15 (W.Va. 1993) (tolling provision that denied minors benefit of general tolling provision applicable to those under disability violated equal protection), *Anson v. American Motors Corp.*, 747 P.2d 581 (Ariz.App. 1987) (statute of limitations that applies discovery rule to personal injury but not wrongful death violates equal protection), *Opinion of the Justices*, 493 A.2d 1182 (N.H. 1985) (equal protection required discovery rule to apply to personal injury actions against private parties and State alike), *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984) (statute of limitations for medical malpractice that applied discovery rule to foreign object and knowing concealment but not to negligent misdiagnosis violated equal protection), *Kenyon v. Hammer*, 688 P.2d 961 (Ariz. 1984) (three-year statute of limitations for medical malpractice without discovery rule violated equal protection), and *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980) (medical malpractice statute of limitations that applied discovery rule only to foreign objects cases violated equal protection).

III. Review is Warranted to Settle Whether the Right of Access to State Courts is a Privilege of Federal Citizenship under the Fourteenth Amendment, and Whether Extinguishing Claims under a Statute of Limitations without the Discovery Rule Violates that Right

Finally, it is arguable under this Court's jurisprudence that the right of access to state courts is a privilege of citizens of the United States under the Privileges and Immunities Clause of the Fourteenth Amendment. *See, e.g., Lawrence v. State Tax Comm'n. of Mississippi*, 286 U.S. 276, 282 (1932) (in which this Court responded as follows to a state court's failure to address a constitutional question at issue: "the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked"); *Strauder v. West Virginia*, 100 U.S. 303 (1879) (defendant's right to have his race included in jury pools in state court is a privilege and immunity of federal citizenship), *abrogated on other grounds, Taylor v. Louisiana*, 419 U.S. 522 (1975).

Whether a statute of limitations that extinguishes claims before the claimants could have known whom to sue infringes the fundamental right of access in a manner that violates the Privileges and Immunities Clause of the Fourteenth Amendment is a federal question yet unanswered, and worthy of being settled, by this Court.

For all of the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA FILED SEPTEMBER 15, 2005

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1788 C.D. 2004
Argued: June 8, 2005

Russell Pennock and Antoinette Pennock, in their individual capacities and on behalf of the Estate of Daniel Pennock,

Appellants

v.

Richard V. Lenzi and Carmine D. Lenzi, in their individual capacities and dba Ridge Crest Farms, Melvin C. Gelsinger, Gale Gelsinger, Esther Gelsinger, Clarence D. Gelsinger, Rettew Associates, Inc., Berks County Conservation District and the Commonwealth of Pennsylvania Department of Environmental Protection

BEFORE: COLINS, President Judge, McGINLEY, Judge, SMITH-RIBNER, Judge, FRIEDMAN, Judge, LEADBETTER, Judge, COHN JUBELIRER, Judge, and LEAVITT, Judge.

OPINION BY JUDGE LEADBETTER

FILED: September 15, 2005

Russell and Antoinette Pennock, in their individual capacities and on behalf of the estate of Daniel Pennock, appeal the order of the Court of Common Pleas of Dauphin County (common pleas) dismissing their complaint with

prejudice on the basis that plaintiffs' wrongful death and survival actions are barred by the two year statute of limitations imposed by 42 Pa.C.S. § 5524(2). We affirm.

Plaintiffs' teenage son, Daniel, died on April 1, 1995, after contracting both rotavirus and staphylococcus infections. Nearly eight years later, on February 21, 2003, plaintiffs filed a complaint alleging that Daniel's death was caused by prolonged exposure to sewage sludge from a neighboring farm. In their complaint, plaintiffs asserted that they could not reasonably know until February 25, 2001 (when they read a newspaper article discussing a connection between sewage sludge and infections) how Daniel had contracted the infections which caused his death. Accordingly, plaintiffs argued that, under the discovery rule, which tolls the statute of limitations until a time when a tort victim can discover his injury and its cause through the exercise of reasonable diligence, their wrongful death and survival actions were timely filed. Plaintiffs sued Richard and Carmine Lenzi, in their individual capacities and doing business as Ridge Crest Farms, who processed and applied the sewage sludge; the Gelsinger family, who were the owners of the farm to which the sludge was applied; Rettew Associates, Inc., an engineering firm hired by the Lenzis to supervise the processing and application of the sludge; and the Commonwealth of Pennsylvania Department of Environmental Protection and the Berks County Conservation District, which issued permits to the Lenzis to operate their sludge business. Defendants filed a preliminary objection to plaintiffs' complaint on the ground that it was

barred by the two year statute of limitations.[1] The court of common pleas agreed, and dismissed plaintiffs' complaint with prejudice, relying upon *Pastierik v. Duquesne Light Company*, 514 Pa. 517, 526 A.2d 323 (1987). In *Pastierik* our Supreme Court confirmed an earlier plurality holding that the statute of limitations for wrongful death and survival claims begins to run, at the latest, at the time of death and cannot be extended further by the discovery rule. Plaintiffs now appeal.

Under 42 Pa.C.S. § 5524(2), "[a]n action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another" must be commenced within two years. This two year time period shall be computed "from the time the cause of action accrued." 42 Pa.C.S. § 5502(a). Normally, a cause of action accrues at the time the injury is inflicted. *Ayers v. Morgan*, 397 Pa. 282, 154 A.2d 788 (1959). However, in some cases where the injury or the fact that it was caused by the conduct of another is not known or discoverable through the exercise of reasonable diligence, courts have invoked the discovery rule, which delays the accrual of a cause of action and tolls the statute of limitations until a time when the injury and its cause can reasonably be discovered. *Ward v. Rice*, 828 A.2d 1118 (Pa.Super.2003).

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1. We note that preliminary objections are not the proper form in which to raise a defense based upon the statute of limitations, and would, themselves, be subject to preliminary objections. *See* Pa. R.C.P. Nos. 1028(a) and 1030(a). However, the Pennocks do not challenge the procedure by which the issue was raised.

Appendix A

In *Anthony v. Koppers Company*, 496 Pa. 119, 436 A.2d 181 (1981), our Supreme Court held, in a plurality opinion, that the statute of limitations for a wrongful death action could not be tolled by the discovery rule.[2] The *Anthony* court reasoned:

> Statutory references to the occurrence of an "injury" or the accrual of a "cause of action" are subject to judicial interpretation as to the degree of knowledge a plaintiff must possess before the statute will start to run. In contrast, the requirement that a wrongful death action be brought within [a certain period of time] after a definitely established event,—"death"—leaves no room for construction.

496 Pa. at 124, 436 A.2d at 184. The *Anthony* court further held that the discovery rule did not apply to survival actions because "survival statutes do not create a new cause of action; they simply permit a personal representative to enforce a cause of action which had already accrued to the deceased before his death." *Anthony*, 496 Pa. at 125, 436 A.2d at 185. Therefore, by definition, the statute of limitations to bring a survival action must begin to run, at the latest, at death. *Id.*

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2. The statute of limitations for wrongful death actions at the time *Anthony* was decided was the precursor to the present statute. It provided that "the [wrongful death] action shall be brought within one year after the death, and not thereafter." *Anthony*, 496 Pa. at 123, 436 A.2d at 183 [quoting Section 2 of The Act of April 26, 1855, P.L. 309, 12 P.S. § 1603, repealed by Section 2(a) of The Judiciary Act Repealer Act, Act of April 28, 1978, P.L. 202].

Appendix A

In *Pastierik*, our Supreme Court reaffirmed its holdings in *Anthony*, again refusing to apply the discovery rule to wrongful death or survival actions. *Pastierik*, 514 Pa. at 525, 526 A.2d at 327. Because Section 5524(2) and Section 5502(a) govern the statute of limitations for wrongful death, survival, and personal injury actions, the plaintiff in *Pastierik* argued, as plaintiffs do in the present case, that the discovery rule should apply equally to all of those actions. *Pastierik*, 514 Pa. at 521, 526 A.2d at 325. The *Pastierik* court rejected this argument, noting that extending the application of the discovery rule to wrongful death actions would "greatly expand, theoretically to infinity, the time period during which wrongful death actions could be brought." *Pastierik*, 514 Pa. at 521, 526 A.2d at 325-326. This, the court stated, was not the intent of the legislature in enacting the statute of limitations because death, which is a "definitely established event," puts survivors on clear notice to exercise reasonable diligence to discover the cause, and, therefore, is significantly different from personal injury, which "may be inflicted without immediate symptoms or immediately determinable causes." *Pastierik*, 514 Pa. at 522, 526 A.2d at 326. The court also recognized that extensive scientific examinations, including autopsy, which are not restrained in scope as would be examinations of living persons, can be (and often are) performed on a deceased tort victim to discover the cause of death and whether wrongful conduct was involved. *Id.* Thus, the discovery rule is not needed in a wrongful death case to prevent the statute of limitations from working an injustice on a reasonably diligent plaintiff. Accordingly, the court rejected the application of the discovery rule to wrongful death actions. *Id.*

As for survival actions, the *Pastierik* court agreed with the principle set forth in *Anthony* that a survival action is merely a cause of action which had already accrued to a decedent before his death and is now being prosecuted by his representatives. *Pastierik*, 514 Pa. at 523, 526 A.2d at 326. Therefore, the statute of limitations begins to run when the decedent, and not his representatives, could have discovered his injury and its cause through the exercise of reasonable diligence. *Id.* Moreover, even if the injury or its cause was not reasonably discoverable to the decedent, the clear notice afforded to his survivors and the extensive scientific examinations available to them make extending the statute of limitations, beyond the two years after death prescribed by the legislature, unnecessary. *Pastierik*, 514 Pa. at 523, 526 A.2d at 327. Thus, the court held that, for survival actions, the cause of action accrues and the two year statute of limitations begins to run, at the latest, at death. *Id.*

Plaintiffs argue on appeal that the *Pastierik* decision violates the remedies, due process, and equal protection clauses of the Pennsylvania Constitution, as well as the privileges and immunities, due process, and equal protection clauses of the United States Constitution. Alternatively, plaintiffs contend that even if *Pastierik* is constitutional, it is wrong as a matter of Pennsylvania law.[3]

We begin our analysis by rejecting plaintiffs' last argument out of hand. *Pastierik* is clearly the law of Pennsylvania, announced in an unequivocal holding of our

3. Plaintiffs' appeal presents only questions of law which are subject to this court's plenary review. *Reich v. Berks County Intermediate Unit No. 14*, 861 A.2d 1005 (Pa.Cmwlth. 2004).

Supreme Court. Even if we believed it were wrongly decided— which we do not—we would be bound to follow it, as was common pleas. *See Lovrinoff v. Pa. Turnpike Comm'n*, 3 Pa.Cmwlth. 161, 281 A.2d 176 (1971). Next, with respect to plaintiffs' constitutional arguments, we flatly reject the notion that in deciding *Anthony* and *Pastierik* our Supreme Court was unmindful of its obligation to interpret statutory law in accordance with constitutional mandates. Simply because the court did not address these constitutional issues directly should not, in any way, suggest that it set such concerns aside, to be considered on some other occasion. On the contrary, we not only assume that our Supreme Court always takes constitutional principles into account when deciding issues of common law, we find its analysis in *Pastierik* specifically addresses the concerns underlying plaintiffs' constitutional claims, even though not discussing them in the context of constitutional arguments.

Moreover, these arguments have been directly addressed by two other courts, the United States Court of Appeals for the Third Circuit and the Superior Court of Pennsylvania. In *Gravinese v. Johns-Manville Corp.*, 324 Pa.Super. 432, 471 A.2d 1233, 1238 (1984), the Superior Court rejected the claim that the decision in *Anthony* (*Pastierik* had not yet been decided) "rendered the statute [of limitations for wrongful death and survival actions] unconstitutional on equal protection and due process grounds." *Id.* at 1237. It noted that "[s]ubject only to the rule that a reasonable time to sue must be allowed, statutes of limitations pertain to remedies and do not impair fundamental rights." *Id.* at 1238. The Third Circuit similarly rejected these arguments in *Ciccarelli v.*

Carey Canadian Mines, Ltd., 757 F.2d 548 (3d Cir.1985).[4] In so doing, the court noted that:

> There is no absolute and unlimited constitutional right of access to the courts. All that is required is a reasonable right of access—a reasonable opportunity to be heard. . . . Plaintiffs' due process claim must therefore fail because here the period is reasonable.
>
> Plaintiffs also insist that by distinguishing between personal injury claims on the one hand and wrongful death and survival actions on the other, i.e., by not extending time periods for the latter through the discovery rule while extending them for the former, the statutes as interpreted violate equal protection. The distinction does not implicate a suspect class nor a fundamental right; consequently, if the distinction is rationally related to a legitimate government interest it does not violate equal protection. A distinction between wrongful death and survival actions, and those personal injury actions brought by living plaintiffs, is related to the state's interest—and those of the survivors—in the prompt settlement of the economic and legal affairs of the deceased.

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4. We note that the equal protection and due process provisions of the Pennsylvania Constitution are analyzed under the same standards employed by the United States Supreme Court in reviewing like claims under the United States Constitution. *Griffin v. Southeastern Pa. Transp. Auth.*, 757 A.2d 448, 451 (Pa.Cmwlth. 2000).

> The state legislature may not be said to be irrational in encouraging a personal representative to bring suit promptly.

Id. at 554-56 (citations omitted). We agree. Moreover, as set forth above, the court in *Pastierik* extensively documented the reasonable grounds for providing a more restrictive limitation on death claims than on personal injury actions.

Nonetheless, plaintiffs assert the notion that, contrary to these holdings, Article I, Section 11 of the Pennsylvania Constitution, often called the "remedies clause," provides an absolute and fundamental right to sue for any injury. Thus they argue that the remedies clause mandates strict scrutiny of any limitation of that right.[5] In making this argument, plaintiffs misunderstand the import of Article I, § 11, which provides:

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5. When reviewing equal protection claims, a court must first decide which level of scrutiny is to be applied to the challenged state action: strict, intermediate, or rational basis. If the state action infringes upon a fundamental right or implicates a suspect classification, such as race or religion, then it is analyzed using strict scrutiny. *Curtis v. Kline*, 542 Pa. 249, 666 A.2d 265 (1995). If the state action infringes upon an important interest, such as a liberty interest or some other interest vital to the individual, or implicates a sensitive classification, such as gender, then intermediate scrutiny is utilized. *Id.* If the state action involves neither of these, it will be analyzed under a rational basis level of scrutiny. *James v. Southeastern Pa. Transp. Auth.*, 505 Pa. 137, 144, 477 A.2d 1302, 1305 (1984). The person challenging the state action bears the burden of showing that it fails to satisfy the applicable standard of scrutiny. *Paz v. Pa. Housing Finance Agency*, 722 A.2d 762, 766 (Pa.Cmwlth.1999).

Appendix A

> All courts shall be open; and every man for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

As our Supreme Court has explained, "the guarantee of a 'remedy by due course of law' in Article I, Section 11, means that a case cannot be altered, in its 'substance', by a subsequent law . . ." *Ieropoli v. AC & S Corp.*, 577 Pa. 138, 149, 842 A.2d 919, 926 (2004). In other words, once a cause of action has accrued it becomes a vested right, which under Article I, Section 11, may not be eliminated by subsequent legislation. *Id.* at 155-56, 842 A.2d at 930. It simply does not mean that the General Assembly may not abridge or limit a cause of action which has not yet accrued.[6] Indeed, a claim that the remedies clause established a fundamental right to sue the Commonwealth, thus requiring strict scrutiny of the limitation of actions provision of the Metropolitan Transportation Authorities Act,[7] was rejected in *James v. Southeastern Pennsylvania Transportation Authority*, 505 Pa.

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6. It is undisputed, of course, that both the statute of limitations at issue and the decision in *Pastierik* occurred long before the death of Daniel Pennock.

7. The provision at issue in *James*, Section 2036 of the Metropolitan Transportation Authorities Act of 1963, P.L. 984 § 36, formerly 66 P.S. § 2036, was repealed by Act of April 28, 1978, P.L. 202, No. 53, § 2(a)(1371).

137, 477 A.2d 1302 (1984). In that case, our Supreme Court reasoned:

> The question, therefore, as to whether the notice classification affects a fundamental right is to be determined by whether the right affected—that of access to the courts in suits against the Commonwealth—is to be found in the constitution. To ask the question is to answer it. As we have seen, Art. I, § 11 of the Pennsylvania Constitution explicitly reserves to the Commonwealth the power to determine in which cases it will be sued. This power, in turn, is derived from the Eleventh Amendment to the United States Constitution, permitting the states to exercise sovereign immunity, should they choose so to do. We conclude, therefore, that there is no "fundamental right" to sue the Commonwealth, for such right is explicitly limited by Art. I, § 11 of the Constitution of Pennsylvania. Since it is not contended that any suspect classification has been made, and we have concluded that there is no fundamental right at issue, strict scrutiny of the statute is inappropriate.

Id. at 146, 477 A.2d at 1306. The court adopted the same analysis, reaching the same conclusion with regard to the statutory cap on claims against political subdivisions in *Smith v. City of Philadelphia*, 512 Pa. 129, 516 A.2d 306 (1986), *cert. denied*, 479 U.S. 1074, 107 S.Ct. 1265, 94 L.Ed.2d 127 (1987). *See also Griffin v. Southeastern Pa. Transp. Auth.*, 757 A.2d 448 (Pa.Cmwlth.2000), and cases cited therein

(rejecting fundamental right claim, and finding statutory cap on damages against the Commonwealth does not offend due process or equal protection clauses under intermediate standard of review.)

The Pennocks attempt to distinguish *James* by arguing that since the remedies clause contains no reservation to the Commonwealth to determine which suits may be brought against private entities, such right must be unqualified. The flaw in this reasoning is that, although the clause is silent both as to any right and any limitations on such right to sue non-Commonwealth parties, it is well-established that the General Assembly may limit or even abrogate causes of action which have not yet accrued. Even causes of action which existed at common law may be abolished by the legislature. *Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 382 A.2d 715 (1978). "In interpreting [the remedies clause], we should remember that no one 'has a vested right in the continued existence of an immutable body of negligence law. . . . [T]he practical result of a [contrary] conclusion would be the stagnation of the law in the face of changing societal conditions.' " *Id.* at 279-80, 382 A.2d at 720. *A fortiori*, if actions which existed at common law may be abolished, so may statutory causes of action created by the legislature,[8] and if they may be abolished, they may be limited

8. Wrongful death actions are solely creatures of statute, having not existed at common law. *Hodge v. Loveland*, 456 Pa.Super. 188, 690 A.2d 243, 245 (1997), *citing Frazier v. Oil Chemical Co.*, 407 Pa. 78, 179 A.2d 202 (1962). At common law, an action for personal injury did not survive death and, therefore, a survival action on behalf of the decedent's estate is also a statutory creation. *See Moyer v. Phillips*, 462 Pa. 395, 399, 341 A.2d 441, 442-43 (1975).

without offending the remedies clause. *James*; *Smith*, 512 Pa. at 134, 516 A.2d at 309; *Griffin*, 757 A.2d at 451.

In addition, as in *James*, since no fundamental right is implicated, and no suspect classification is alleged, strict scrutiny of the limitation is inappropriate. Rather, the interest is an "important" one, deserving of intermediate scrutiny. *James*, 505 Pa. at 146-47, 477 A.2d at 1306. To pass muster under this level of scrutiny, the governmental interest must be an important one, and the classification must be narrowly drawn so as to be closely related to the objectives of the legislation and affect only those persons intended to be affected. *James*, 505 Pa. at 147-48, 477 A.2d at 1307. Although *Gravinese* and *Ciccarelli* applied a rational basis test, and *Pastierik* did not engage in a due process or equal protection analysis as such, we believe that the reasons described in those cases amply satisfy the intermediate scrutiny standard of review.

As noted, statutes of limitations serve an important state interest by preventing a plaintiff from sleeping on his rights "until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-349, 64 S.Ct. 582, 88 L.Ed. 788 (1944). In sum, they prevent the passage of time from adversely affecting an alleged tortfeasor's ability to defend himself. Accordingly, the discovery rule should only be applied when it is necessary to prevent the statute from working an injustice on a reasonably diligent plaintiff. As the *Pastierik* court recognized, because of the clear notice that death provides, combined with the ability to perform unrestricted testing to discover its cause, the need for a

discovery rule is less compelling in wrongful death or survival actions than in ordinary injury claims, which may be "inflicted without immediate symptoms or immediately determinable causes . . . [and] shrouded by indefinite factors." 514 Pa. at 522, 526 A.2d at 326. The distinction between personal injury actions and wrongful death and survival actions is thus reasonably related to serving the legitimate state interest of preventing a plaintiff from sleeping on his rights to the detriment of the defendant. Therefore, as in *James*, "we conclude that the statute passes constitutional muster under both the Fourteenth Amendment and Art. I, § 26 of the Pennsylvania Constitution." 505 Pa. at 148, 477 A.2d at 1307.[9]

The Pennocks' state and federal due process claims fail for the same reasons, as the concerns of those provisions are closely intertwined with the concerns of the equal protection and remedies clauses. Our Supreme Court has long held that "[n]o one has a vested right in a statute of limitations or other procedural matters. The legislature may at any time alter, amend or repeal such provisions without offending constitutional restraints. So long as there is no omission of a remedy for the enforcement of a right for which a remedy existed when the right accrued, a want of due process is in no way involved." *Bible v. Dep't of Labor & Indus.*, 548 Pa. 247, 254, 696 A.2d 1149, 1152 (1997) [quoting *Agostin v. Pittsburgh Steel Foundry Corp.*, 354 Pa. 543, 548-49, 47 A.2d

9. We note that some courts have found that wrongful death and survival claimants are not in the same class of persons as personal injury claimants, and, thus, an equal protection analysis is unnecessary. *See, e.g., Tiedeken v. Tiedeken*, 363 N.W.2d 909, 911 (Minn.Ct.App.1985). *See also Gravinese*, 471 A.2d at 1238.

680, 683 (1946) (superseded, as recognized in *Bible*, by 1974 amendments to the Workers' Compensation Act)]. As the United States Supreme Court concluded in *Chase Securities Corporation v. Donaldson*, 325 U.S. 304, 314, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945), as a matter of constitutional law, "statutes of limitation go to matters of remedy, not to destruction of fundamental rights." Thus, so long as the statute of limitations provides for a reasonable time period for a plaintiff to bring suit, the statute will be upheld. *Id. Accord Gravinese*, 471 A.2d at 1238. Because of the clear notice that death provides, combined with the ability to perform an autopsy to discover its cause, the two years prescribed by the legislature afford a decedent's representatives a reasonable opportunity to bring suit.

We also must reject plaintiffs' argument that *Pastierik* violates the privileges and immunities clause of the United States Constitution. It is well-settled that the clause is to be narrowly construed, and does not require that a state always apply all of its laws equally. *Com. v. Lightman*, 339 Pa.Super. 359, 489 A.2d 200, 204 (1985). Furthermore, the Supreme Court has severely limited the applicability of the clause to only those privileges and immunities "bearing on the vitality of the Nation as a single entity." *Baldwin v. Mont. Fish and Game Comm'n*, 436 U.S. 371, 383, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978). It cannot be said that our Supreme Court's refusal to apply the discovery rule to wrongful death and survival claims, claims which would not exist but for the grace of the Pennsylvania legislature, has any impact on the vitality of the nation.

Accordingly, we see no constitutional error in common pleas' application of *Pastierik* to the present case. Further, we agree with the trial court that, as their claims are barred by 42 Pa.C.S. § 5524(2), granting plaintiffs leave to amend their complaint would be fruitless,[10] and thus affirm the dismissal of plaintiffs' complaint with prejudice.[11]

s/ Bonnie Brigance Leadbetter
BONNIE BRIGANCE LEADBETTER, Judge

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10. *See Kearney v. City of Phila.*, 150 Pa.Cmwlth. 517, 616 A.2d 72 (1992) (holding that a trial court did not abuse its discretion by denying a plaintiff leave to amend where further amendment could not circumvent defendant's immunity).

11. Because we hold that the discovery rule is inapplicable to wrongful death and survival claims and, thus, the statute of limitations bars plaintiffs' claims, we need not address the issue of plaintiffs' failure to substantially state a claim against Rettew Associates, Inc.

APPENDIX B — OPINION AND ORDER OF THE COURT OF COMMON PLEAS, DAUPHIN COUNTY, PENNSYLVANIA DATED JUNE 30, 2004

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

NO. 2003 CV 0848

CIVIL ACTION - LAW

RUSSELL PENNOCK and ANTOINETTE PENNOCK, in their individual capacities and on behalf of the ESTATE OF DANIEL PENNOCK,

Plaintiffs

v.

RICHARD V. LENZI, CARMINE D. LENZI, Individually and d/b/a RIDGE CREST FARMS, MELVIN C. GELSINGER, GALE GELSINGER, CLARENCE D. GELSINGER, RETTEW ASSOCIATES, INC., BERKS COUNTY CONSERVATION DISTRICT and THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants

BEFORE TURGEON, CLARK AND BRATTON, JJ.

OPINION

Currently before the court are the preliminary objections filed by defendant Rettew Associates, Inc. For the reasons set forth below, the defendant's preliminary objections are sustained.

Appendix B

Background

The facts, as alleged in plaintiffs' complaint and taken to be true for the purpose of ruling upon these preliminary objections, are as follows: Plaintiffs' teenaged son, Daniel Pennock, died April 1, 1995, after contracting both a rotavirus and a staphylococcus aureus (staph) infection. Plaintiffs allege that Daniel contracted the rotavirus and staph from prolonged exposure to dust and fumes emitted from pathogens found in Class B sludge, which had been applied to a farm located across the street from the Pennocks' home between 1988 and 1995. It is alleged that Daniel's lungs, throat and mouth were susceptible to these pathogens by having inhaled lime, which was used to stabilize the sludge prior to its application on the farm. Plaintiffs claim they first became aware on February 25, 2001 that their son's death might be related to his exposure to sewage sludge, after having read several local newspaper articles about the health risks posed by sewage sludge. On February 21, 2003, Daniel's parents, plaintiffs Russell and Antoinette Pennock, filed their complaint asserting claims under the wrongful death and survival statutes.

The complaint identifies four defendant entities as responsible for their son's death: the Lenzi defendants, who operated the facility that processed and spread the sludge; the Gelsinger defendants, who owned the farm upon which the sludge was applied; two governmental agencies, Commonwealth of Pennsylvania Department of Environmental Protection (DEP), which issued permits to the Lenzi defendants to operate their sludge business and oversaw compliance with DEP regulations, and the Berks

County Conservation District, which worked in conjunction with and under the direction of the DEP; and finally, moving defendant Rettew Associates, a professional engineering and consulting company hired by the Lenzi defendants "to oversee the sludge process conducted by [the Lenzi defendants] and the application of the sludge at the Gelsinger farms." (Complaint ¶ 25)

The Lenzi defendants, through Richard Lenzi, doing business as Ridge View Farms, had been initially granted a permit in 1987 by the DEP (then known as the Department of Environmental Resources), to operate a facility to process and dispose of Class B sludge collected by a Downingtown treatment plant. Ridge View Farms was located on a Berks County farm owned by defendant Carmine Lenzi, who is a partner with Richard Lenzi in Ridge View Farms. The permit granted Richard Lenzi a license to apply sludge on the 287-acre Gelsinger farm.

The allegations of Rettew's connection to the events, as pled, consist of the following: The Lenzi defendants hired defendant Rettew in 1991 to oversee or manage the sludge process conducted by the Lenzi defendants and the application of sludge to the Gelsinger farm. (Complaint ¶ 25; Preliminary Objections ¶ 12) Plaintiffs allege Rettew oversaw the application of 1406 tons of sludge to the Gelsinger farm in 1991, 1431 tons in 1992, 1549 tons in 1993, and 1234 tons in 1994. (Complaint ¶¶ 31-34) In 1995, 1401 tons were applied to the Gelsinger farm through just the first three months of the year. (Complaint ¶¶ 35-36) Plaintiffs note also that the Lenzi defendants were prohibited from applying sludge to frozen or snow covered ground. (Complaint ¶ 19)

Appendix B

Plaintiffs also state that the annual operations report submitted by the Lenzi defendants, under the signature of a Rettew engineer, indicated that beginning in 1988, the Gelsinger farm was receiving sludge applications five times per week on ten fields covering approximately 300 acres. (Complaint ¶ 29) Rettew was also responsible for seeking renewal of the Lenzi defendants DEP permit. (Complaint ¶ 25) Rettew's application was successful and the Lenzi defendants permit was renewed in October 1993 for a ten-year period. Plaintiffs aver that the renewed permit allowed application of sludge at both Ridge Crest Farms and the Gelsinger farm, although the sludge was applied only to the Gelsinger farm according to the annual operations report submitted by Ridge Crest Farms, again under the signature of a Rettew engineer. (Complaint ¶ 30)

Legal Discussion

Defendant Rettew's primary preliminary objection is in the nature or a demurrer, wherein it asserts the complaint should be dismissed for failure to state a claim under Pa.R.C.P. 1028(a). Rettew also alleges that the complaint is insufficiently specific under Pa.R.C.P. 1028(a), and fails to conform to Pa.R.C.P. 1042.2 on the basis that the plaintiffs failed to expressly state they are seeking to impose liability upon Rettew as the result of a breach of a professional obligation.

A demurrer tests the legal sufficiency of the complaint. In deciding whether a demurrer is warranted, the court admits as true all material facts set forth in the complaint and all inferences reasonably deducible therefrom. The

question presented is whether, on the facts averred, the law says with certainty that no recovery is possible; where any doubt exists, the demurrer should be overruled. *Belser v. Rockwood Cas. Ins. Co.*, 791 A.2d 1216, 1219 (Pa. Super. 2002) (citations omitted). Rettew argues the plaintiffs have failed to allege any facts establishing that it had a professional duty relating to the application, processing or storage of sludge, that it committed an error or omission breaching any such professional duty, or that their was a causal connection between the alleged breach and the injuries suffered by the decedent. We agree with the moving defendant, and accordingly, sustain Rettew's demurrer.

This court's close examination of plaintiffs' complaint indicates that viable allegations of duty, breach and causation are entirely absent against defendant Rettew. Plaintiffs have broadly alleged only that Rettew had a duty "to oversee the sludge process conducted by [the Lenzi defendants] and the application of the sludge at the Gelsinger farms." (Complaint ¶ 25) While this claim might subsume other specific allegations in the complaint, such specific allegations, including inferences reasonably deducible therefrom, do not exist. For instance, plaintiffs make their most specific allegations against the DEP, which had authority to regulate the land application of sewage sludge. Plaintiffs assert that the DEP failed to perform its regulatory duties including ensuring the Lenzi defendants followed reporting requirements, analyzing reports received, performing spot inspections to determine the level of toxins incorporated into the soil, and ensuring that the land used for sludging was properly marked. (Complaint ¶ 55) Plaintiffs also assert the DEP adopted faulty regulations that were enacted by the EPA

without proper testing or oversight. (Complaint ¶ 56) As a result, plaintiffs claim facilities owned by the Lenzis committed numerous undetected violations causing a dangerous physical hazard to the community around the Gelsinger farm. (Complaint ¶ 57) None of these allegations are directed at Rettew.

Plaintiffs otherwise raise a myriad of broad allegations of duty, but do not fault Rettew anywhere for having breached any such duty. For instance, in one of the few specific allegations aimed at Rettew, plaintiffs assert that Rettew oversaw what plaintiffs note was a much greater than normal amount of sludge application in the first three months of 1995, additionally noting that sludge may not be applied on frozen or snow covered ground. (Complaint ¶¶ 35-36) Plaintiffs, however, make no allegation that too much sludge was in fact actually applied in 1995, or that any sludge was applied to frozen or snow covered ground.

Plaintiffs also assert that the DEP permits granted to the Lenzi defendants required, among other things, that the sludge was to be applied in thin layers, was to be turned over and incorporated into the soil within 24 hours of application, was not to be applied during periods of rain, to saturated ground, frozen ground, or ground covered with snow, was not to be applied within 50 feet of property lines or 300 feet of an occupied dwelling, and was not to be applied in quantities that would result in run-off, vector, or odor problems. (Complaint ¶ 19) Despite this litany of obligations, plaintiffs have not asserted that any of them were violated, except insofar as the Lenzi defendants were cited by DEP on

three occasions, in 1988 and 1990, respectively, prior to Rettew's hiring by the Lenzi defendants.[1]

Plaintiffs also allege in their complaint that as of April 1988, DEP's sludge processing regulations required the Lenzi defendants, to among other things, submit operating reports, obtain commercial liability insurance and perform a quarterly self-test of the digestion method they used to process sludge and report these results to DEP. (Complaint ¶ 23) No allegations have been made that the Lenzi defendants failed to abide by these requirements, or how Rettew was responsible in any way.

Plaintiffs allege under the renewed permit that the Lenzi defendants were allowed to apply sludge to both the Gelsinger farm and Ridge View Faints, and also allowed them to apply only the sludge generated by the Downingtown waste treatment facility. (Complaint ¶ 27, 30) Plaintiffs again, however, stop short of claiming that sludge was over-applied to the Gelsinger farm or that they obtained sludge from a source other than Downingtown. In any event, plaintiffs have failed to connect Rettew to these particular averments.

Plaintiffs also aver that under applicable CFR regulations, the Class B sludge applied by the Lenzi defendants was required to be self-tested for pathogens at the time of use or at the time of disposal and was also required

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1. Plaintiffs have pled that the Lenzi defendants were cited twice in 1988 for applying sludge to frozen ground and storing sludge on site, respectively, and once in 1990 for failing to incorporate sludge into the soil within 24 hours of application. (Complaint ¶¶ 41-42, 46)

to be stabilized with lime. (Complaint ¶¶ 38-39) Furthermore, under DEP regulations, sludge that: could not be spread due to ground conditions or machinery, could not be stored on-site for later application but had to be disposed of at a landfill. (Complaint ¶ 40) Again, despite highlighting these obligations, plaintiffs have not asserted they were not complied with, or specifically how Rettew was involved.

Finally, plaintiffs state that both the Lenzi and Gelsinger defendants committed un-cited DEP violations by failing to mark the land as having been applied with sludge, failing to inform persons living adjacent to the sludge farm when sludging would commence, and otherwise failing to restrict the use or access to the farm land for any period of time during the years that sludge was applied. (Complaint ¶¶ 43, 44, 48) Plaintiffs also aver that the Gelsinger defendants violated applicable rules and regulations by letting the decedent, his father and brother hunt on land to which sludge had been recently applied. (Complaint ¶¶ 47-48) Again, plaintiffs have failed to connect Rettew in any way to these un-cited regulatory violations.

Plaintiffs have argued that should the court find their complaint wanting in some manner that the court grant them leave to amend. Defendant Rettew has countered that leave to amend should not be granted since any amendment would be barred by the two-year statute of limitations. We agree with Rettew. On October 14, 2003, the Honorable Richard Lewis issued a memorandum order sustaining the preliminary objections of the Lenzi defendants, Gelsinger defendants and defendant Berks County Conservation District. That order barred plaintiffs' claims against those defendants then under

the applicable two-year statute of limitations on the basis that the law in Pennsylvania precludes application of the discovery rule to toll the statute of limitations in wrongful death and survival actions. *Pastierik v. Duquesne Light Co.*, 526 A.2d 323 (Pa. 1987). Inasmuch as Judge Lewis' decision is the law of the case under the coordinate jurisdiction rule, amendment would clearly be a fruitless exercise. *See*, *Zane v. Friends Hospital*, 836 A.2d 25, 29 (Pa. 2003)

Accordingly, we enter the following:

ORDER

AND NOW, this 30th day of June, 2004 the Preliminary Objections filed by Defendant Rettew Associates, Inc. are hereby SUSTAINED. Plaintiffs' Complaint is dismissed as to the moving defendant, with prejudice.

BY THE COURT:

s/ Jeannine Turgeon
Jeannine Turgeon, Judge

APPENDIX C — MEMORANDUM ORDER OF THE COURT OF COMMON PLEAS, DAUPHIN COUNTY, PENNSYLVANIA DATED OCTOBER 14, 2003

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

NO. 2003 CV 848

RUSSELL PENNOCK and ANTOINETTE PENNOCK, in their individual capacities and on behalf of the ESTATE OF DANIEL PENNOCK,

Plaintiffs

v.

RICHARD V. LENZI, CARMINE D. LENZI, in their individual capacities and d/b/a RIDGE CREST FARMS, MELVIN C. GELSINGER, GALE GELSINGER, ESTHER GELSINGER, CLARENCE D. GELSINGER, RETTEW ASSOCIATES, INC., BERKS COUNTY CONSERVATION DISTRICT and THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants

Before KLEINFELTER, LEWIS and CLARK, JJ.

MEMORANDUM ORDER

AND NOW, this 14th day of October 2003, upon consideration of the Preliminary Objections submitted by Defendants Lenzi, Gelsinger and Berks County Conservation

District, the parties' legal memoranda, and oral argument held September 18, 2003, IT IS HEREBY ORDERED that Defendants' Preliminary Objection to Plaintiffs' Complaint on the basis that Plaintiffs' claims are barred by the two-year statute of limitations is SUSTAINED.

While this court is sympathetic to plaintiffs' argument that it is illogical for the discovery rule to apply to causes for personal injury, but not wrongful death, we are constrained by our Supreme Court's ruling in *Pastierik v. Duquesne Light* Co. 526 A.2d 323 (1987). In *Pastierik*, the majority refused to toll the statute of limitations for wrongful death by reason of the discovery rule "[b]ecause death is not an event that is indefinite as to the time of its occurrence, and because survivors are immediately put on notice that they may proceed to determine the cause of death . . ." *Id.* at 324.

Further, based on this court's ruling resulting in the dismissal of Plaintiffs' claims, all other preliminary objections raised by the Defendants are deemed moot.

BY THE COURT:

s/ Richard A. Lewis
Richard A. Lewis, Judge

APPENDIX D — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT DENYING PETITION FOR ALLOWANCE OF APPEAL DATED APRIL 19, 2006

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 846 MAL 2005

RUSSELL PENNOCK AND ANTOINETTE PENNOCK, IN THEIR INDIVIDUAL CAPACITIES AND ON BEHALF OF THE ESTATE OF DANIEL PENNOCK,

Petitioners

v.

RICHARD V. LENZI AND CARMINE D. LENZI, IN THEIR INDIVIDUAL CAPACITIES AND D/B/A RIDGE CREST FARMS, MELVIN C. GELSINGER, GALE GELSINGER, ESTHER GELSINGER, CLARENCE D. GELSINGER, RETTEW ASSOCIATES, INC., BERKS COUNTY CONSERVATION DISTRICT AND THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents

Appendix D

ORDER

PER CURIAM

AND NOW, this 19th day of April, 2006, the Petition for Allowance of Appeal is hereby DENIED.

(2)

No. 06-57

FILED

AUG 8 - 2006

In The

Supreme Court of the United States

RUSSELL PENNOCK and ANTOINETTE PENNOCK, in their individual capacities and on behalf of the ESTATE OF DANIEL PENNOCK,

Petitioners,

v.

RICHARD V. LENZI and CARMINE D. LENZI in their individual capacities and d/b/a RIDGE CREST FARMS, MELVIN C. GELSINGER, GALE GELSINGER, ESTHER GELSINGER, CLARENCE D. GELSINGER, RETTEW ASSOCIATES, INC., BERKS COUNTY CONSERVATION DISTRICT, and THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

On Petition For A Writ Of Certiorari To The Commonwealth Court Of Pennsylvania

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COUNTER-STATEMENT OF QUESTION PRESENTED

Should this Honorable Court consider whether the application of a statute of limitations without the discovery rule in wrongful death and survival claims violates due process, equal protection and privileges and immunities under the Fourteenth Amendment?

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STATEMENT OF JURISDICTION

On April 19, 2006, the Pennsylvania Supreme Court denied the petition for allowance of appeal filed by Petitioners. Such an order constitutes a final order and invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.

COUNTER-STATEMENT OF THE CASE

On February 21, 2003, Petitioners, Russell Pennock and Antoinette Pennock, individually and on behalf of the Estate of Daniel Pennock, filed a Complaint under Pennsylvania's Wrongful Death and Survival Statutes for the death of their son, Daniel Pennock. Plaintiffs alleged that Daniel began experiencing a sore throat and other symptoms of illness on March 16, 1995, and that he was subsequently admitted to the hospital on March 19, 1995. On March 20, 1995, Daniel was diagnosed with Staphyloccus Aureus, and it was later determined that he also suffered from a Rotavirus. On April 1, 1995, Daniel Pennock died in the hospital due to these infections.

According to Plaintiffs' Complaint, Dr. David L. Lewis, a scientist working for the Department of Environmental Protection and an alleged expert in the field of pathogens and land application of sewage sludge, reviewed Daniel Pennock's medical records. Dr. Lewis determined that the Rotavirus and staph infection found in Daniel were contracted from Daniel's prolonged exposure to dust and fumes emitted from pathogens found in the sewage sludge applied by Respondents on a farm owned by the Gelsinger defendants.

Petitioners stated in their Complaint that Respondents were negligent in failing to mark the land as an area to which sewage sludge was being applied. They also alleged that Respondents were negligent for failing to notify neighbors of the Gelsinger farm that sludge was going to be applied to the farmland and for failing to restrict the use or access to the farmland for thirty days following application of the sludge.

Respondents filed preliminary objections to Petitioners' Complaint, arguing that Petitioners' claims were barred by the applicable two-year statute of limitations, 42 Pa.C.S.A. § 5502(a), and that that the discovery rule was inapplicable to wrongful death and survival actions under existing Pennsylvania law. Respondents stated in their preliminary objections that Petitioners' claims were time barred because they did not institute their action until almost eight years after Daniel Pennock's death. Respondents further argued that Petitioners had failed to allege any basis upon which relief could be granted under the wrongful death and survival statutes and argued that Petitioners' complaint was deficient as a matter of law and should be dismissed with prejudice.

The Honorable Richard A. Lewis of the Court of Common Pleas of Dauphin County, by Orders dated October 14, 2003 and December 16, 2003, sustained the preliminary objections of Respondents, finding that Plaintiffs' claims were barred by the two-year statute of limitations. Judge Lewis stated as follows in his October 14, 2003, Order:

> "AND NOW, this 14th day of October 2003, upon consideration of the Preliminary Objections submitted by Defendants Lenzi, Gelsinger and Berks County Conservation District, the parties'

> legal memoranda, and oral argument held September 18, 2003, IT IS HEREBY ORDERED that Defendants' Preliminary Objections to Plaintiffs' Complaint on the basis that Plaintiffs' claims are barred by the two-year statute of limitations is SUSTAINED.
>
> While this court is sympathetic to plaintiffs' argument that it is illogical for the discovery rule to apply to causes for personal injury, but not wrongful death, we are constrained by our Supreme Court's ruling in *Pastierik v. Duquesne Light Co.*, 526 A.2d 323 (1987). In *Pastierik*, the majority refused to toll the statute of limitations for wrongful death by reason of the discovery rule '[b]ecause death is not an event that is indefinite as to the time of its occurrence, and because survivors are immediately put on notice that they may proceed to determine the cause of death. . . .' *Id.* at 324.
>
> Further, based on this court's ruling resulting in the dismissal of Plaintiffs' claims, all other preliminary objections raised by the Defendants are deemed moot."

Petitioners appealed the decision of Judge Lewis to the Commonwealth Court of Pennsylvania after the entry of a final, appealable order by the Honorable Jeannine Turgeon on July 26, 2004. On September 15, 2005, the Commonwealth Court of Pennsylvania issued its decision, upholding the decision of the lower court in dismissing the claims of Petitioners due to the running of the statute of limitations. The Commonwealth Court found that *Pastierik v. Duquesne Light Company*, 526 A.2d 323 (1986), in which the Pennsylvania Supreme Court refused to apply the discovery rule to wrongful death or survival actions, was the "unequivocal" holding of the

Pennsylvania Supreme Court and "clearly" the law of Pennsylvania. *Pennock v. Lenzi*, 882 A.2d 1057, 1061 (Pa.Cmwlth. 2005).

The Commonwealth Court also rejected Petitioners' claims that the refusal to apply the discovery rule to wrongful death and survival actions was a violation of due process and equal protection rights under the Pennsylvania and United States Constitutions, that it was a violation of the Remedies Clause of the Pennsylvania Constitution, or that it was a violation of the Privileges and Immunities Clause of the United States Constitution. The Commonwealth Court noted that the equal protection and due process provisions of the Pennsylvania Constitution are analyzed under the same standards as the United States Constitution. *Pennock*, 882 A.2d at 1062.

Petitioners then petitioned the Pennsylvania Supreme Court for allowance of appeal, requesting that it review the decision of the Commonwealth Court. However, by Order dated April 19, 2006, the Pennsylvania Supreme Court denied review of the decision. Petitioners have now filed the instant Petition for a Writ of Certiorari, arguing that their due process and equal protection rights under the Fourteenth Amendment have been violated, and also, should the Court find that the right of access to a state court is a privilege of citizenship under the Fourteenth Amendment, that their privileges and immunities rights have been violated. However, Petitioners have not raised any issues that require review by this Court.

REASONS FOR OPPOSING THE WRIT OF CERTIORARI

A. No Review Is Needed To Determine Whether Extinguishing Claims Under A Statute Of Limitations Without The Discovery Rule Violates Due Process

Petitioners argue that this Court has not answered the issue of whether applying a statute of limitations without the discovery rule is a violation of due process by failing to provide an opportunity to sue. The Third Circuit Court of Appeals decided this issue in *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548 (3rd Cir. 1985). The appellants in *Ciccarelli* argued that their due process rights had been violated because their wrongful death and survival claims had been extinguished by the application of the Pennsylvania statute of limitations without the benefit of the discovery rule.

The Third Circuit relied upon this Court's decision in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945) when deciding this issue. Quoting Justice Jackson, the Third Circuit indicated that statutes of limitations are "by definition arbitrary, representing a public policy about the privilege to litigate." *Ciccarelli*, 757 F.2d at 555, *citing Chase Securities*, 325 U.S. at 314. The Third Circuit decided that a statute of limitations that extinguishes a claim before the claimant knows that he has sustained an injury will not violate due process if the limitation period is reasonable. *Ciccarelli*, 757 F.2d at 555.

The reasonableness standard relied upon by the Third Circuit finds support in the precedent of this Court. In fact, Petitioners acknowledge this standard in their instant Petition. Petitioners cite *Logan v. Zimmerman*,

455 U.S. 422 (1982) and *Atchafalaya Land Co. v. F.B. Williams Cypress Co.*, 258 U.S. 190 (1922), and state in their Petition that, "[t]here is no doubt under this Court's jurisprudence that a state statute of limitations satisfies the Due Process Clause of the Fourteenth Amendment if it provides a 'meaningful time' to present a claim in a 'meaningful manner,' and if it provides a 'reasonable time' in which to bring a lawsuit." *See Petitioners' Petition for a Writ of Certiorari*, p. 11 (citations omitted).

This Court further stated in *Logan* that a state "certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan*, 455 U.S. at 437. In *Atchafalaya*, this Court stated, "such statutes are valid if they allow a reasonable time after their enactment, for the assertion of an existing right or the enforcement of an existing obligation." *Atchafalaya*, 258 U.S. at 197. It stands to reason therefore that this Court has established a reliable means of addressing the due process issue that Petitioners now bring before the Court.

In *Pastierik*, *supra*, the Pennsylvania Supreme Court indicated that there are numerous reasons that the discovery rule is not applied to wrongful death and survival actions. The Pennsylvania Supreme Court decided that the application of the discovery rule to wrongful death claims could potentially expand to infinity the time period in which to bring such a claim. *Pastierik*, 526 A.2d at 521. The Court also determined that death is a definitely established event that puts survivors on notice of a potential claim, which they can immediately begin to investigate to determine its cause. *Id.* at 522. The Court further found that the Pennsylvania legislature did not intend the

discovery rule to apply to wrongful death and survival claims. *Id.* at 521.

A determination of whether Petitioners' due process rights have been violated can be made by applying the reasonableness standard already established by this Court. No review is needed to consider the due process issue raised by Petitioners. The precedent of this Court provides a reliable standard on which to judge potential due process violations caused by the application of a statute of limitations to extinguish a claim. Moreover, applying the reasonableness standard to the instant matter reveals that Petitioners' due process rights have not been violated.

B. No Review Is Needed To Determine Whether The Application Of The Discovery Rule To Personal Injury Claimants But Not Wrongful Death And Survival Claimants Violates Equal Protection

Petitioners argue that this Honorable Court should consider whether their equal protection rights under the Fourteenth Amendment have been violated because the discovery rule in Pennsylvania is applied to toll the statute of limitations for personal injury claimants but is not applied to wrongful death and survival claimants. The Third Circuit considered this exact issue in *Ciccarelli, supra.* The Court found that the distinction drawn between personal injury claimants and wrongful death and survival claimants does not implicate a suspect class nor a fundamental right. *Ciccarelli*, 757 F.2d at 555. Therefore, the Third Circuit reasoned that it is only necessary to determine if the distinction drawn between personal injury claimants and wrongful death and survival claimants is rationally related to a legitimate government interest. *Id.*

The Third Circuit found that the distinction between personal injury claimants and wrongful death and survival claimants is rationally related to the interest of the state in the prompt settlement of the economic and legal affairs of the deceased. *Id.* at 556. The Third Circuit found that it is not irrational for the legislature to encourage a personal representative to bring suit promptly. Citing this Court's decision in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944), the Third Circuit found that the statute of limitations applicable to wrongful death and survival actions represents a conclusion by the state that " 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.' " *Ciccarelli*, 757 F.2d at 556.

The Seventh Circuit considered a similar issue in *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979), wherein it was asked to consider whether an Indiana statute that permitted personal injury claimants to seek punitive damages but forbade such damages to wrongful death claimants was a violation of equal protection. The Seventh Circuit noted at the outset that the legislative classification involved neither race nor other "immutable human attributes" and therefore did not constitute invidious discrimination. *Huff*, 609 F.2d at 298. The Court also found that the statute did not involve fundamental rights. *Id.*

Based upon these initial findings and relying upon the precedent established by this Court, the Seventh Circuit decided that the statute was entitled to a presumption of validity and would be upheld "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legislative purposes that we can only conclude that the

legislature's actions were irrational." *Id.* at 298, *citing Parham v. Hughes*, 441 U.S. 347, 351 (1979). The Seventh Circuit decided that the statute did not violate equal protection under the Fourteenth Amendment and found that it was not irrational. *Id.*

As noted above, the current application of the Pennsylvania statute of limitations without the discovery rule for wrongful death and survival actions has been held to be reasonable and rationally related to a legitimate government interest. *See Ciccarelli, supra* and *Pastierik, supra.* The distinction drawn between personal injury claimants and wrongful death and survival claimants does not affect those groups that require a strict scrutiny or immediate scrutiny standard but only a rational basis standard, which the statute has survived. *Ciccarelli, supra.*

This Court does not need to review whether the application of the discovery rule to personal injury claimants but not wrongful death and survival claimants is in violation of the equal protection rights of the Petitioners. The established precedent of this Court indicates that a rational basis test should be applied to consider this issue, which the Third Circuit Court of Appeals and Commonwealth Court of Pennsylvania have already done, finding that no violation exists.

C. No Review Is Needed To Determine Whether There Exists A Right Of Access To The Courts Under The Privileges And Immunities Clause Of The Fourteenth Amendment And Whether The Application Of A Statute Of Limitations Without The Benefit Of The Discovery Rule Violates The Privileges And Immunities Clause Of The Fourteenth Amendment

Petitioners argue that review by this Court is needed to determine whether access to state courts is a right of federal citizenship protected by the Privileges and Immunities Clause of the Fourteenth Amendment and whether extinguishing claims without the benefit of the discovery rule is a violation of that right. In *Christopher v. Harbury*, 536 U.S. 403 (2002), Justice Souter indicated that decisions of this Court have grounded the right of access to the courts in various sources, including the Privileges and Immunities Clause of Article IV of the United States Constitution, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Equal Protection Clause of the Fourteenth Amendment. *Christopher*, 536 U.S. at 415.

In *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142 (1907), this Court stated that "[t]he right to sue and defend in the courts is the alternative of force. * * * It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens." *Chambers*, 207 U.S. at 148. However, and most important to the instant matter, this Court stated specifically that, subject to the restrictions of the Federal Constitution, a state "may determine the limits of

the jurisdiction of its courts, and the character of the controversies which shall be heard in them." *Id.*

In *Blake v. McClung*, 172 U.S. 239 (1898), this Court, citing its prior decision in the *Slaughter-House Cases*, 16 Wall. 36, 21 L.Ed. 394 (1873), discussed the effect of the Privileges and Immunities Clause contained within Article IV of the United States Constitution and the rights that it protected.

> "The [Privileges and Immunities Clause] did not create those rights which it called privileges and immunities of citizens of the several states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state government over the rights of its own citizens. Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

Blake, 172 U.S. at 251, *citing*, *Slaughter-House Cases*, 16 Wall. at 77.

In *Blake*, this Honorable Court established that the Privileges and Immunities Clause of Article IV will not be used to limit a state's ability to establish the power of its government over the rights of its citizens. Instead, the Court determined that the Privileges and Immunities Clause will be used to ensure that a state government will apply its laws equally to the citizens of its state and the citizens of other states who find themselves under its jurisdiction.

Petitioners do not argue that their privileges and immunities have been abrogated by the imposition of an inequitable law that treats the citizens of different states unequally. Petitioners argue instead that the expungement of their wrongful death and survival claims without the discovery rule is a violation of their right of access to the courts, which they argue is protected by the Privileges and Immunities Clause of the Fourteenth Amendment.

However, Respondents believe that a decision as to whether the Privileges an Immunities Clause of the Fourteenth Amendment protects and individual's right of access to the courts is unnecessary. As Justice Souter noted in *Christopher*, *supra*, the right of access to the courts has been traced to numerous constitutional provisions. Petitioners do not put forth any compelling reasons why the right of access to the courts should be fastened to yet another provision, nor do they indicate why the current right of access, finding its root of protection in no less than four constitutional articles, is insufficient to protect their right to seek judicial intervention. Petitioners ignore the fact that there is no absolute and unlimited constitutional right of access to the courts. *Ciccarelli*, 757 F.2d at 554. "All that is required is a reasonable right of access, a reasonable opportunity to be heard." *Id.*, *citing*, *Wayne v. Tennessee Valley Authority*, 730 F.2d 392, 403 (5th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985).

The application of the statute of limitations without the discovery rule does not run afoul of Petitioners' privileges and immunities. Petitioners, like all similarly situated individuals, were permitted two years in which to bring a wrongful death or survival action. The Petitioners were given the same opportunity under the law as other

similarly situated persons, and the state did nothing to abridge their right of access to the courts.

Review by this Honorable Court is not needed to determine whether the Petitioners' right of access to the courts is protected by the Privileges and Immunities Clause of the Fourteenth Amendment. The precedent of this Court has grounded the right of access to the courts in numerous constitutional provisions, which afforded the Petitioners with the protection of their right to bring a claim. This Court has set forth a reasonable and reliable judicial framework to determine if an individual has been denied his or her right of access to the courts, and it does not need to consider whether the Fourteenth Amendment protects this right. Furthermore, using the framework established under the Privileges and Immunities Clause of Article IV, Petitioners have not shown any denial or violation of their privileges and immunities. The statute of limitations that applied to their claim for wrongful death is equally applied to other similar claims, and there has been no violation of their privileges and immunities.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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(3)

No. 06-57

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OFFICE OF THE CLERK
SUPREME COURT

IN THE

Supreme Court of the United States

RUSSELL PENNOCK and ANTOINETTE PENNOCK, in their individual capacities and on behalf of the ESTATE OF DANIEL PENNOCK,

Petitioners,

v.

RICHARD V. LENZI and CARMINE D. LENZI, in their individual capacities and d/b/a Ridge Crest Farms, MELVIN C. GELSINGER, GALE GELSINGER, ESTHER GELSINGER, CLARENCE D. GELSINGER, RETTEW ASSOCIATES, INC., BERKS COUNTY CONSERVATION DISTRICT and the COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION FOR RESPONDENT RETTEW ASSOCIATES, INC.

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COUNTER-STATEMENT OF QUESTION PRESENTED

Should this Honorable Court consider whether Pennsylvania violates the Due Process Clause, Equal Protection Clause or Privileges and Immunities Clause of the United States Constitution by distinguishing between the living and the dead with respect to the application of its common law discovery rule to toll its state created statute of limitations for personal injury actions?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Rettew Associates, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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COUNTER STATEMENT OF THE CASE

In February 2003, nearly eight years after the 1995 death of their son, the Petitioners, Russell Pennock and Antoinette Pennock, filed wrongful death and survival actions in the Pennsylvania Court of Common Pleas of Dauphin County. They sued both individually and on behalf of their son's estate.

The Complaint asserts that Petitioners' son passed away on April 1, 1995, as a result of rotavirus and staph infections that he contracted from his exposure to toxins contained in sewage sludge that was spread, pursuant to permits, on neighboring farmland. (Complaint, ¶¶13, 65, 66, 68.) Petitioners contend that they did not learn of the dangers associated with exposure to sewage sludge and its potential connection to their son's death until February 2001 when they read a newspaper article on that issue (Complaint, ¶¶73, 74), though they admit in their Petition for a Writ of Certiorari ("Petition") that after their son's death they engaged an attorney to investigate their son's death. (Petition, p. 3). Petitioners do not claim in their Complaint that they *could* not have discovered this alleged connection within the two year statute of limitations, but rather allege only that they *did* not.[1]

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[1] Petitioners frame issues in their Petition from the perspective of a claimant that could not have discovered the injury or its cause, but neither the Complaint nor the Petition (which adds many factual assertions that are not of record) offers any explanation for why a qualified medical professional could not have determined within the statute of limitations how the Petitioners' son died.

Defendants Richard V. Lenzi, Carmine D. Lenzi, Melvin C. Gelsinger, Gale Gelsinger, Esther Gelsinger, Clarence D. Gelsinger and the Berks County Conservation District all filed preliminary objections to the Complaint on the basis that the claims are barred by Pennsylvania's two year statute of limitations for personal injury. 42 Pa.C.S.A. §5524(2). On October 14, 2003, the trial court issued a Memorandum Order sustaining the preliminary objections and dismissing the Complaint as against those defendants because the claims are barred by the statute of limitations. (Pet. App. C at 26a-27a).

Defendant Rettew Associates, Inc. ("Respondent"), also filed preliminary objections seeking dismissal of the Complaint for the failure to state a claim of negligence against Respondent and on the basis of the bar of the statute of limitations. On June 30, 2004, the Court of Common Pleas sustained Respondent's preliminary objections and dismissed the Complaint. The Court further refused to grant Petitioners leave to amend the Complaint because it concluded that the two year statute of limitations barred Petitioners' claim against Respondent. (Pet. App. B at 17a, 24a-25a).

On September 15, 2005, the trial court's orders dismissing the Complaint were upheld by the Commonwealth Court of Pennsylvania. (Pet. App. A). On April 19, 2006, the Supreme Court of Pennsylvania denied Petitioners' Petition for Allowance of Appeal. (Pet. App. D).

SUMMARY OF THE ARGUMENT

The application of a state statute of limitations to a state created right of action for wrongful death and survival is not an issue that places this case among the select group of cases in which certiorari discretion should be exercised.

Pennsylvania's refusal to defer accrual of the statute of limitations to wrongful death and survival actions is a well considered and eminently rational decision that implicates no federal constitutional rights.

REASONS FOR DENYING THE PETITION

A. None of the Considerations Governing Review on Writ of Certiorari are Applicable

Review on a writ of certiorari is a matter of judicial discretion, not of right, that is granted only for "compelling reasons". Sup.Ct.R. 10. Rule 10 identifies the considerations that define an appropriate candidate for review upon writ of certiorari.

Petitioners base their Petition upon subsection (c) of Rule 10, which addresses cases in which "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Petitioners argue that the "Commonwealth Court of Pennsylvania has decided an important federal question of constitutional law that has not been, but should be settled by this Court", which they frame as follows: "Does the

Fourteenth Amendment require states to apply the discovery rule to the statute of limitations when the plaintiff could not, with the exercise of reasonable diligence, know the facts of both injury and causation within the statutory time limit?" (Pet., pp. 10-11)[2].

Petitioners misstate the issue being presented to this Court. Pennsylvania applies a discovery rule to actions for bodily injury filed by living plaintiffs. It finds, however, that

[2] Although this is the only declared basis for the Petition, Petitioners also mention in two footnotes that the states are split on whether "extinguishing claims without the benefit of the discovery rule violates due process" and "equal protection." (Pet. pp. 14-17, n. 7 and 8). Thus, it appears that Petitioners may be asserting that Rule 10(b) also applies in that the Pennsylvania Supreme Court has decided an important federal question in a way that conflicts with the decision of another state court of last resort. However, of the 32 cases cited in these footnotes, the descriptions of the cases provided by Petitioners show that only one case appears to come close to confronting the issue presented to the Pennsylvania Supreme Court in *Pastierik*. That case, *Anson v. American Motors Corp.*, 747 P.2d 581 (Ariz. App. 1987), was a decision by the Arizona Court of Appeals and not the Arizona Supreme Court and therefore Rule 10(b) would not apply. Even so, the *Anson* case does not support Petitioners' cause. The *Anson* opinion does not address whether the application of the discovery rule to personal injury actions and not wrongful death actions violates the Fourteenth Amendment of the United States Constitution. Instead, *Anson* is confined to the question of whether the accrual provision of the Arizona statute of limitations for products liability actions violates the Arizona Constitution. The Arizona Constitution contains pertinent provisions not found in the United States Constitution, including that "[n]o law shall be enacted in this state limiting the amount of damage to be recovered for causing the death or injury of any person" and "[t]he right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation." *Anson*, 747 P.2d at 583-87.

it is unwise to defer the accrual of a cause of action for wrongful death/ survival because entirely different considerations exist when the injured party is dead. The Petitioners contend that it is unconstitutional for Pennsylvania to distinguish between the living and the dead with respect to determining when the statute of limitations begins to run for claims related to bodily harm. Although Petitioners contend that the manner by which Pennsylvania applies of its common law "discovery rule" to state created causes of action related to bodily harm implicates constitutional concerns, it does not. What is presented to this Court is a matter of Pennsylvania law that does not merit review by the nation's highest Court.

B. This is Not an Appropriate Case for this Honorable Court's Review

Petitioners brought an action for wrongful death and survival almost eight years after the death of their son. The statute of limitations in Pennsylvania for wrongful death actions is two years. 42 Pa. C.S.A. §5524. The two year period is computed from the "time the cause of action accrued." 42 Pa.C.S.A. §5502(a). Petitioners argued before the Pennsylvania state courts that the common law "discovery rule" should have been applied to their claim thereby tolling the statute of limitations until Petitioners could, with reasonable diligence, discover the cause of their son's death. However, the Pennsylvania Supreme Court in *Pastierik v. Duquesne Light Co.*, 526 A.2d 323 (Pa. 1987), has clearly held that the discovery rule does not apply to wrongful death or survival actions. Accordingly, Petitioners' action was dismissed on preliminary objections based upon the expiration of the two year statute of limitations.

Petitioners ask this Court to find that the Pennsylvania Supreme Court's refusal to apply the Pennsylvania "discovery rule" to toll the statute of limitations for claims of wrongful death and survival, violates the Due Process Clause, the Equal Protection Clause and the Privileges and Immunities Clause of the United States Constitution. Petitioners argue that there is no basis to distinguish, for purposes of the application of the discovery rule, between decedents and living plaintiffs. Notably, Petitioners failed to explore in detail Pennsylvania's "discovery rule" and its pleading rules in their Petition. Had they done so, it would be evident that this case does not merit this Court's review.

In Pennsylvania, a cause of action accrues when the plaintiff could have first maintained the action to a successful conclusion. *Fine v. Checcio*, 870 A.2d 850, 857 (Pa. 2005). The statute of limitations begins to run as soon as the right to institute and maintain a suit arises. *Id.* Generally speaking, in a suit to recover damages for personal injuries, this right arises when the injury is inflicted. *Id.* Mistake, misunderstanding, or lack of knowledge do not toll the running of the statute. *Id.* As a general rule, a party asserting a cause of action is under a duty to use all reasonable diligence to be properly informed of the facts and circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period. *Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 468 A.2d 468, 471 (Pa. 1983). Moreover, as the Pennsylvania Supreme Court has said, "'[t]here are [very] few facts which diligence cannot discover. . . .'" *Fine*, 870 A.2d at 858 (citations omitted).

The discovery rule is a judicially created exception to the statute of limitations originating in cases in which the

injury or its cause was neither known nor reasonably knowable, despite the exercise of reasonable diligence. *Id.* at 858.

> The purpose of the discovery rule has been to exclude from the running of the statute of limitations that period of time during which a party who has not suffered an immediately ascertainable injury is reasonably unaware that he had been injured, so that he has essentially the same rights as those who have suffered such an injury.

Id. When the discovery rule applies, the statute of limitations is tolled and does not being to run until the injured party discovers or reasonably should discover, that he has been injured and that his injury has been caused by another party's conduct. *Id.* at 859.

Petitioners do not allege in their Complaint that they could not have discovered the alleged cause of their son's death within the two year statute of limitations period. Instead, they aver simply that they "first became aware of the dangers associated with exposure to sewage sludge in February of 2001."[3] (Complaint, ¶73). After the review of their son's medical records by Dr. David L. Lewis, it was determined that his rotavirus and staph infections were caused by his prolonged exposure to the dust and fumes emitted

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[3] Pennsylvania is a fact pleading jurisdiction requiring that the Complaint contain all the material facts upon which a claim is based. Pa.R.Civ.P. 1019(a). Accordingly, Petitioners were required to plead all facts establishing their right to maintain their claim despite the passage of the two year statute of limitations.

from the pathogens found in Class B sewage sludge.[4] (Complaint, ¶¶ 66 and 68).

However, Petitioners never plead and never assert that the alleged cause of their son's death could not have been discovered within the statute of limitations had they acted with reasonable diligence to investigate the cause of his death. They do not allege that breakthroughs in science or scientific testing account for why their son's alleged cause of death could be not be determined until 2001, as opposed to 1995, 1996 or 1997. Indeed, Petitioners admit in their Petition that they were told by their son's doctors that he died of staphylococcus aurea and rotavirus infections, that the circumstances of his death alerted them to the need to investigate it, and that they engaged an attorney to conduct an investigation. (Pet., p. 3). Thus, Petitioners did in fact conduct an investigation into their son's death, and there is no basis to conclude that had Dr. Lewis or some other qualified doctor reviewed their son's records within two years of his death, Petitioners would not have discovered the alleged cause of their son's infections and subsequent death within the statutory period. The record in this matter fails to disclose the assertion by the Petitioners of the crucial element necessary to support the application of the discovery rule to their patently untimely filing of their claims. Accordingly, based upon the pleadings, this matter is not one to which the discovery rule would apply in any event, and therefore, this matter is not appropriate for this Court's review. The Court should deny the writ.

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[4] Although not explicitly pled, this review and analysis by Dr. Lewis must have been done sometime after February 2001 as Petitioners aver that they became aware of Dr. Lewis after reading an article in February 2001 about sewage sludge which mentioned Dr. Lewis as an expert in that field. (Complaint, ¶¶73-78).

C. The Decision of the Supreme Court of Pennsylvania in *Pastierik* Does Not Violate the Equal Protection Clause, Due Process Clause, or the Privileges and Immunities Clause of the United States Constitution.

The issue presented by Petitioners is an issue of state law that does not implicate any provisions of the United States Constitution. The deficiencies in each of Petitioners' constitutional claims are addressed below.

1. The Pennsylvania Supreme Court's Decision in *Pastierik* Does Not Violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Petitioners argue that the Pennsylvania Supreme Court's decision in *Pastierik* permitting application of the Pennsylvania discovery rule to toll the statute of limitations for living personal injury plaintiffs but precluding its application for deceased plaintiffs asserting wrongful death claims, violates the Equal Protection Clause of the United States Constitution. Petitioners are incorrect; the distinction made in *Pastierik* satisfies the requirements of equal protection under the United States Constitution.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no state may "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1. Petitioners attempt to argue that the issue they have raised involves a fundamental right of access to the courts requiring strict scrutiny review, but it does not. Petitioners have not been denied access to the courts of Pennsylvania. To the contrary, they had two years from the date of their son's death

in which to bring their wrongful death claim. The Pennsylvania Supreme Court's decision in *Pastierik* merely enforces the statutory time limit created by the Pennsylvania legislature in which such claims must be brought. The refusal to apply the discovery rule to defer accrual of wrongful death and survival actions therefore does not affect a fundamental right. *See Chase Securities Corporation v. Donaldson*, 325 U.S. 304, 314 (1945) (stating that "statutes of limitation go to matters of remedy, not to destruction of fundamental rights."); *see also, Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 555-56 (3d Cir. 1985)(treating claim of denial of access to courts under rational basis review); *Gravinese v. Johns-Manville Corp.*, 471 A.2d 1233, 1238 (Pa. Super. 1984) ("Subject only to the rule that a reasonable time to sue must be allowed, statutes of limitations pertain to remedies and do no impair fundamental rights."). [5] Thus, the allegedly unfair distinction between the living and the dead with respect to the application of the discovery rule to the statute of limitations is subject to the least exacting scrutiny provided by the rational basis test. *See*, *Heller v. Doe*, 509 U.S. 312, 319-320 (1993) (classifications that involve neither a fundamental right nor proceed along suspect lines are subject to rational basis review). Under the rational basis test, any distinction made that is rationally related to a legitimate government interest does not violate equal protection. *Ciccarelli*, 757 F.2d at 555-56 *citing United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). This Court has acknowledged that statutes of limitations serve an important state interest by preventing a

[5] Further, this Court has held that the right to sue for wrongful death of another is not considered a "fundamental" or constitutional right. *Parham v. Hughes*, 441 U.S. 347, 358 n.12 (1979) ("It cannot seriously be argued that a statutory entitlement to sue for the wrongful death of another is itself a 'fundamental' or constitutional right.").

plaintiff from sleeping on his rights "until evidence has been lost, memories have faded, and witnesses have disappeared." *R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944).

The Pennsylvania Supreme Court's holding that the discovery rule does not apply to wrongful death/survival actions but does apply to personal injury actions pursued by living plaintiffs is rationally related to the state's important interest in preventing stale claims and prejudice to the alleged tortfeasor that accompanies such stale claims. The Pennsylvania Supreme Court has articulated its basis for distinguishing between the living and the dead with respect to the application of the discovery rule with sufficient clarity and force to survive any level of scrutiny, but it certainly meets the test of rationality.

In 1981, the Pennsylvania Supreme Court held in a plurality opinion that the statute of limitations for a wrongful death action can not be tolled by the discovery rule.[6] *Anthony v. Koppers Company*, 436 A.2d 181, 183-84 (Pa. 1981). The Court's carefully considered rationale for the distinction was that:

> Statutory references to the occurrence of an "injury" or the accrual of a "cause of action" are subject to judicial interpretation as to the degree of knowledge a plaintiff must possess before

[6] The statute of limitations for wrongful death actions at the time *Anthony* was decided was the precursor to the present statute. It provided that "the [wrongful death] action shall be brought within one year after the death, and not thereafter." *Anthony*, 436 A.2d at 183. The statute for such actions is now two years. 42 Pa.C.S.A. §5524(2).

> the statute will start to run. In contrast, the requirement that a wrongful death action be brought within [a certain period of time] after a definitely established event, — "death"— leaves no room for construction.

Anthony, 436 A.2d at 184. The same rule applies to survival actions because "survival statutes do not create a new cause of action; they simply permit a personal representative to enforce a cause of action, which had already accrued to the deceased before his death." *Id.* at 185. Therefore, the statute of limitations to bring a survival action begins to run, at the latest, at the death of the plaintiff's decedent.

In *Pastierik*, the Pennsylvania Supreme Court reaffirmed its holdings in *Anthony*, again refusing to apply the discovery rule to wrongful death or survival actions. *Pastierik*, 526 A.2d at 327. In *Pastierik*, as in the present matter, the plaintiffs argued that the discovery rule should apply to both wrongful death actions and personal injury actions. The *Pastierik* Court rejected this argument, because extending the application of the discovery rule to wrongful death actions would "greatly expand, theoretically to infinity, the time period during which wrongful death actions could be brought." *Id.* at 325-26. The Court did not "believe that such was the intent of the legislature in enacting 42 Pa.C.S.A. §5502(a), for while the concept of accrual may have usefulness in delaying the point at which the statute of limitations begins to run with respect to injuries, . . . because injuries are of a nature that they may be inflicted without immediate symptoms or immediately determinable causes, causes of action for death must be regarded in a different light since they are not similarly shrouded by indefinite factors." *Id.* at 326 (citations omitted).

Because "'death' is a 'definitely established event,'" "survivors are immediately put on notice that they may proceed to determine the cause of death" and "there is no basis to regard the cause of action for death as accruing at any time other than at death." *Id.* "Upon the death of an individual, survivors are put on clear notice thereof, and they have the opportunity to proceed with scientific examinations aimed at determining the exact cause of death so that a wrongful death action, if warranted, can be filed without additional delay." *Id.* [7] The Court recognized that such examinations, including autopsies, are "designed to make a final determination as to the cause of death, and they are not restrained or limited in their scope, as would be examinations of living persons. . . ." *Id.* For these well considered reasons, the Court reaffirmed *Anthony* and determined that the discovery rule is not needed in a wrongful death case to prevent the statute of limitations from working an injustice on a reasonably diligent plaintiff. Accordingly, the Court rejected the application of the discovery rule to wrongful death actions.[8] *Id.* at 326-27.

The legitimate purposes of statutes of limitations are furthered by the Pennsylvania Supreme Court's distinction between suits filed by the living and those filed on behalf of the dead with respect to the application of the Pennsylvania discovery rule. The Pennsylvania Supreme Court has not only

[7] This is, of course, exactly what the Petitioners admit happened in this case. They did investigate the cause of their son's death shortly after he passed away. They seek to be relieved from the consequences of an ineffective investigation.

[8] With respect to survival actions, the *Pastierik* Court agreed with the *Anthony* Court that a "'the survival statutes do not create a new cause of action; they simply permit a personal representative to enforce a cause of action which has already accrued.'" *Id.* at 327.

articulated a rational basis for this long-held distinction, it has articulated a compelling basis to treat these categories of claimants differently, consistent with a reasonable goal of assuring that potential claims do not linger in perpetuity, and as such the Pennsylvania Supreme Court's decision in *Pastierik* and the principle of law set forth therein does not violate the Equal Protection Clause of the United States Constitution.

2. The Pennsylvania Supreme Court's Decision in *Pastierik* Does Not Violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Petitioners also argue that the *Pastierik* decision violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petitioners do not challenge the constitutionality of the wrongful death statute of limitations itself, but rather the holding of *Pastierik* that the discovery rule is not applicable to wrongful death and survival actions.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that States shall not "deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. Amend. XIV, §1. Although the Petition does not distinguish between the concepts of procedural and substantive due process, and Petitioners do not articulate the specific basis for their claim, it appears (based upon the case law cited by Petitioners) that Petitioners' claim is that they suffered a deprivation of their procedural due process rights. The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. *Board of Regents of State Colleges v.*

Roth, 408 U.S. 564, 569 (1972). Although also not articulated in the Petition, it appears Petitioners may be claiming a deprivation of a property interest grounded in the right to bring a cause of action for wrongful death. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (stating that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause).

The *Pastierik* decision does not violate the Due Process Clause. The Due Process Clause has been interpreted in plain terms to provide that the "State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Logan*, 455 U.S. at 434. However, as this Court has stated, "nothing we have said entitles every civil litigant to a hearing on the merits in every case," *id.* at 437, and "[t]his is not to suggest, of course, that the State must consider the merits of the claim when the claimant fails to comply with a reasonable procedural requirement, or fails to file a timely charge." *Id.* at 434 n. 7; *see Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (noting as an example that a State can enter a default judgment against a defendant, who, after adequate notice, fails to make a timely appearance). "The State remains free to create substantive defenses or immunities for use in adjudication — or to eliminate its statutorily created causes of action altogether. . . ." *Logan*, 455 U.S. at 432. In such circumstances, the legislative determination provides all the process that is due. *Id.* at 433. Moreover, "[t]he State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, . . . or, in an appropriate case, filing fees. . . . And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Id.* at 437 (citations omitted).

Further, the Third Circuit, citing to this Court for support, has addressed the issue Petitioners raise in the context of the Pennsylvania statute of limitations for wrongful death and the application of same by the *Pastierik* Court and found no violation. As the Third Circuit explained, "[t]here is no absolute and unlimited constitutional right of access to courts. All that is required is a reasonable right of access — a reasonable opportunity to be heard." *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 554-55 (3d Cir. 1985), *citing Boddie v. Connecticut*, 401 U.S. 371, 378 (1971).

The *Ciccarelli* Court found that the Pennsylvania Supreme Court's decision in *Pastierik* with respect to its application of the statute of limitations does not violate the plaintiffs' due process rights. *Ciccarelli*, 757 F.2d at 555. In reaching its decision, as part of its reasoning, the Third Circuit quoted from this Court in *United States v. Kubrick*, 444 U.S. 111 (1979):

> Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," *Wood v. Carpenter*, 101 U.S. [(11 Otto] 135, 139 [25 L.Ed. 807] (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349, 88 L.Ed. 788, 64 S.Ct. 582 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having

> to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. *United States v. Marion*, 404 U.S. 307, 322 n. 14, 30 L.Ed. 2d 468, 92 S.Ct. 455 (1971); *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428, 13 L.Ed. 2d 941, 85 S.Ct. 1050 (1965); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 89 L.Ed. 1628, 65 S.Ct. 1137 (1945); *Missouri, K. & T.R. Co. v. Harriman*, 227 U.S. 657, 57 L.Ed. 690, 33 S.Ct. 397 (1913); *Bell v. Morrison*, 26 U.S. (1 Pet.) 351, 360 L.Ed. 174 (1828).

Ciccarelli, 757 F.2d at 555, quoting *United States v. Kubrick*, 444 U.S. 111, 117 (1979). As pointed out by the *Ciccarelli* Court this Court has also recognized that statutes of limitations:

> are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Ciccarelli, 757 F.2d at 555, quoting *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). Because statutes of

limitations are in some sense arbitrary, the period to initiate suit occasionally expires before a claimant has sustained any injury or before he knows he has sustained an injury, but such " a statute does not violate due process if the limitation period is otherwise reasonable." *Id.* at 555. The *Ciccarelli* Court concluded that the *Pastierik* Court's interpretation and application of the statute of limitations to wrongful death/ survival actions did not violate due process because the time period provided by the legislature was reasonable. *Id.* at 555.

In the present matter, Petitioners' complaints regarding the constitutionality of the *Pastierik* decision are unfounded. All that the *Pastierik* Court did was enforce the two year statute of limitations for wrongful death that was enacted by the Pennsylvania legislature. Petitioners do not argue, nor could they, that the time period provided by the statute was not reasonable. Accordingly, Petitioners do not have any claim for deprivation of their procedural due process rights by virtue of the ruling of the Pennsylvania Supreme Court in *Pastierik* and their Petition should be denied.

3. The Pennsylvania Supreme Court's Decision in *Pastierik* Does Not Violate the Privileges and Immunities Clause of the United States Constitution.

The right of access to the courts is analyzed under the Privileges and Immunities Clause of Article IV, §2, of the United States Constitution. *Warren v. Harbury*, 536 U.S. 403, 415, n.12 (2002); *Baldwin v. Fish and Game Commission of Montana, et al.*, 436 U.S. 371, 383 (1978).[9] "When the

[9] Petitioners incorrectly maintain that the right of access to state courts is a privilege of citizens of the United States under the Privileges and Immunities Clause of the Fourteenth Amendment. Petitioners cite no case law that so holds.

Privileges and Immunities Clause has been applied to specific cases, it has been interpreted to prevent a State from imposing unreasonable burdens on citizens of other States in . . . access to the court of the State." *Baldwin*, 436 U.S. at 383. That is not the situation that exists in the present case. Pennsylvania's discovery rule, as applied to wrongful death/survival actions, imposes no such burden.

Petitioners are Pennsylvania citizens suing in a Pennsylvania state court, and they cannot and do not claim to have been denied access to the courts because they are citizens of some other state. Instead, they repeat the same argument that they made to support their untenable due process claims, which is that the Pennsylvania Supreme Court's decision with respect to the application of the Pennsylvania discovery rule to their wrongful death / survival action has improperly denied them access to the courts. That is a right the Privileges and Immunities clause is not designed to protect. Moreover, the Clause applies to only those "'privileges' and 'immunities' bearing upon the vitality of the Nation." *Baldwin*, 436 U.S. at 383. Certainly it cannot be said that the Pennsylvania Supreme Court's refusal to apply its common law discovery rule to wrongful death actions depletes the vitality of the nation.

Petitioners have failed to establish a violation of the Privileges and Immunities Clause of the United States Constitution and their Petition should be denied.

CONCLUSION

Petitioners had two years from the date of the death of their son to investigate and determine the cause of his death and to bring suit thereon, if warranted. Petitioners were clearly on notice of potential claims and they conducted an investigation which simply failed to yield relevant scientific information in time for them to pursue litigation under the law of Pennsylvania. Petitioners did not plead that they could not with reasonable diligence have discovered the alleged cause of their son's death within the two year statute of limitations, and they offer in their Petition no reason why they could not have done so. The United States Constitution does not require that causes of action survive indefinitely. Petitioners had a reasonable right of access to the courts and a reasonable opportunity to be heard. Petitioners present for this Court's consideration an issue of interpretation and application of Pennsylvania law governing the accrual of wrongful death actions that does not implicate any provisions of the United States Constitution. This matter does not merit the attention of the nation's highest court. For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 06-57

FILED

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

RUSSELL PENNOCK and
ANTOINETTE PENNOCK, in their
individual capacities and on behalf of the
ESTATE OF DANIEL PENNOCK,

Petitioners,

v.

RICHARD V. LENZI and CARMINE D. LENZI
in their individual capacities and d/b/a RIDGE
CREST FARMS, MELVIN C. GELSINGER,
GALE GELSINGER, ESTHER GELSINGER,
CLARENCE D. GELSINGER, RETTEW ASSOCIATES,
INC., BERKS COUNTY CONSERVATION DISTRICT,
and THE COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

On Petition For A Writ Of Certiorari
To The Commonwealth Court Of Pennsylvania

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioners' Failure To Raise Their Fourteenth Amendment Due Process And Equal Protection Arguments Before The Highest Court Of Pennsylvania In Which A Decision Could Be Had Precludes Petitioners From Raising These Arguments Before This Honorable Court?

II. Whether The Discovery Rule, Which Tolls A Statute Of Limitations Until Both An Injury Is Identified And The Cause Of The Injury Is Known, Is A Privilege And Immunity Of United States Citizenship Under The Fourteenth Amendment Entitling Petitioners To Application Of The Discovery Rule In A Wrongful Death Action?

III. Assuming *Arguendo*, Whether Petitioners' Due Process Rights Under The Fourteenth Amendment Are Violated When The Discovery Rule Is Not Applied To A Statute Of Limitation For Wrongful Death Actions?

IV. Assuming *Arguendo*, Whether Petitioners' Equal Protection Rights Under The Fourteenth Amendment Are Violated When The Discovery Rule Is Not Applied To A Statute Of Limitation For Wrongful Death Actions?

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STATEMENT OF JURISDICTION

The basis for jurisdiction in this Honorable Court is 28 U.S.C. §1257.

Respondents contend that Petitioners have waived their arguments as to the Due Process and Equal Protection Clauses of the Fourteenth Amendment by failing to appeal those issues to the Supreme Court of Pennsylvania, which is the highest court of Pennsylvania in which a decision could be had. Respondents also contend that Petitioners have voluntarily abandoned their survival action, and any alleged arguments raised in support of the survival action have been abandoned.

The Opinion and Order of the Commonwealth Court of Pennsylvania for which review is sought by Petitioners was entered on September 15, 2005. The Supreme Court of Pennsylvania denied Petitioners' Petition for Allowance of Appeal by Order entered April 19, 2006.

STATEMENT OF THE CASE

Petitioners Russell and Antoinette Pennock filed a civil action on February 21, 2003 in the Court of Common Pleas of Dauphin County, Pennsylvania, docket no. 2003 CV 0848, seeking damages for the death of their son, Daniel, on April 1, 1995. The Complaint sounds in wrongful death pursuant to 42 Pa. C.S. §8301 [Death action] and survival pursuant to 42 Pa. C.S. §8302 [Survival action].

On October 14, 2003, Judge Lewis of the Court of Common Pleas of Dauphin County granted a preliminary objection of the Defendants Gelsingers, Lenzis, Ridge Crest Farms, and Berks County Conservation District,

dismissing the Petitioners' Complaint on the grounds that the statute of limitations for the Petitioners' actions had expired. On December 16, 2003, the Trial Court clarified its Order of October 14, 2003 without altering its substance.

On June 30, 2004, Judge Turgeon of the Court of Common Pleas of Dauphin County granted the preliminary objections of Rettew Associates, dismissing the Petitioners' Complaint as to Rettew Associates on the basis of a failure to state a claim. In light of the Trial Court's prior ruling on the statute of limitations issue, the Trial Court denied Petitioners' request for leave to amend their Complaint against Rettew Associates.

Although the Petitioners' Complaint has not been dismissed as to Defendant Pennsylvania Department of Environmental Protection (DEP), the Trial Court granted Plaintiffs' petition for a determination of finality under Pa. R.A.P. 341(c). On July 26, 2004, the Trial Court granted Petitioners' petition for a determination of finality making the Orders of October 14, 2003, December 16, 2003, and June 30, 2003 appealable as final orders.

Petitioners filed their Notice of Appeal to the Commonwealth Court on August 24, 2004. Petitioners filed a "Brief for Appellants" in the Commonwealth Court.[1] In the Commonwealth Court of Pennsylvania, Petitioners argued that extinguishment of wrongful death and survival claims before Petitioners could discover the "culprits" violates the Remedies, Due Process, and Equal Protection Clauses of the Pennsylvania Constitution and/or the Privileges and

[1] Petitioners' Brief for Appellants to the Commonwealth Court is attached hereto as Appendix A.

Immunities, Due Process, and Equal Protection Clauses of the United States Constitution. *See* Appendix A, App. 10. On September 15, 2005, the Commonwealth Court of Pennsylvania affirmed the Trial Court's ruling.

Thereafter, Petitioners filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court seeking review.[2] Petitioners failed to raise the same issues in their appeal to the highest court of Pennsylvania. Petitioners raised as error in the Supreme Court of Pennsylvania the limited issues of whether,

> the right to a remedy for wrongful death is fundamental under the Remedies Clause of the Pennsylvania Constitution (Pa. Const. Art. 1, §11), the Due Process Clause of the Pennsylvania Constitution (Pa. Const. Art. 1, §1), and the Privileges and Immunities Clause of the Fourteenth Amendment of the U.S. Constitution (U.S. Const., Amend. XIV, §1).

See Appendix B, App. 45. Petitioners' Petition for Allowance of Appeal to the Pennsylvania Supreme Court contains a footnote explaining that in the Commonwealth Court,

> [t]he Pennocks also asserted that the right to a remedy for wrongful death is protected by the Equal Protection Clauses of the Pennsylvania and U.S. Constitutions, and by the Due Process Clause of the U.S. Constitution. Again for the sake of narrowing the issues for resolution by this Court [the Pennsylvania Supreme Court], the Pennocks have dropped these arguments.

---

[2] Petitioners' Petition for Allowance of Appeal to the Pennsylvania Supreme Court is attached hereto as Appendix B.

See Appendix B, App. 48, n.2. Additionally, Petitioners indicated that they have "decided to drop" their survival claim "for the sake of narrowing the issues." *See* Appendix B, App. 47, n.1. On April 19, 2006, the Pennsylvania Supreme Court denied Petitioners' Petition for Allowance of Appeal.

Given the procedural posture of this case, the "facts" of this matter will be derived from the allegations as expressed in the Petitioners' Complaint.[3] Petitioners allege that their son, Daniel Pennock, died on April 1, 1995 as a result of alleged exposure to staphylococcus aurea bacteria and a rotavirus from sludge applied to the land on the farm of Defendant Gelsingers. *See* Appendix C, App. 65-67, ¶¶ 58-72. According to Petitioners, Daniel first noticed symptoms of an illness and a sore throat on March 16, 1995; Daniel Pennock was hospitalized on March 19, 1995, and died on April 1, 1995. *See* Appendix C, App. 65-66, ¶¶ 59, 62, 65.

According to their Complaint, Petitioners were unaware of the cause or a possible cause of Daniel Pennock's death until February 25, 2001. *See* Appendix C, App. 67, ¶ 73. At that time, Petitioners saw or heard about a series of articles in the *Reading Eagle* on the topic of sewage sludge, which reported a death allegedly linked to sludge. *See* Appendix C, App. 67, ¶ 74. Eventually, Petitioners came to believe that sewage sludge may have played a role in Daniel Pennock's death and finally initiated legal action on February 21, 2003, six (6) years after Daniel died and four years after the expiration of the statute of limitations.

[3] Petitioners' Complaint, without attachments, is attached hereto as Appendix C.

REASONS IN SUPPORT OF DENIAL OF THE PETITION FOR A WRIT OF CERTIORARI

I. Review Is Not Warranted As To The Due Process And Equal Protection Assignments Of Error When Petitioners Failed To Appeal These Issues To The Highest Court Of Pennsylvania Prior To Petitioning This Honorable Court For A Writ Of Certiorari

After Petitioners' case was dismissed from the Court of Common Pleas of Dauphin County, Pennsylvania, Petitioners filed an appeal with the Commonwealth Court of Pennsylvania, an intermediate appellate court of Pennsylvania. In the Commonwealth Court of Pennsylvania, Petitioners argued that extinguishment of wrongful death and survival claims before Petitioners could discover the "culprits" violates the Remedies, Due Process, and Equal Protection Clauses of the Pennsylvania Constitution and/or the Privileges and Immunities, Due Process, and Equal Protection Clauses of the United States Constitution. *See* Appendix A, App. 10. The Commonwealth Court affirmed the Court of Common Pleas' decision dismissing Petitioners' case. Thereafter, Petitioners filed their Petition for Allowance of Appeal with the Pennsylvania Supreme Court, the highest court of Pennsylvania.

Petitioners failed to raise the same issues in their appeal to the highest court of Pennsylvania. Petitioners raised as error in the Supreme Court of Pennsylvania the limited issues of whether,

> the right to a remedy for wrongful death is fundamental under the Remedies Clause of the Pennsylvania Constitution (Pa. Const. Art. 1, §11), the Due Process Clause of the Pennsylvania Constitution (Pa. Const. Art. 1, §1), and the Privileges

> and Immunities Clause of the Fourteenth Amendment of the U.S. Constitution (U.S. Const., Amend. XIV, §1).

See Appendix B, App. 45. Petitioners' Petition for Allowance of Appeal to the Pennsylvania Supreme Court contained a footnote explaining that in the Commonwealth Court,

> [t]he Pennocks also asserted that the right to a remedy for wrongful death is protected by the Equal Protection Clauses of the Pennsylvania and U.S. Constitutions, and by the Due Process Clause of the U.S. Constitution. Again for the sake of narrowing the issues for resolution by this Court [the Pennsylvania Supreme Court], the Pennocks have dropped these arguments.

See Appendix B, App. 48, n.2.

Petitioners also limited their appeal to the Pennsylvania Supreme Court to their wrongful death action. Petitioners indicated in their Petition for Allowance of Appeal to the Pennsylvania Supreme Court that they have "decided to drop" their survival claim "for the sake of narrowing the issues." *See* Appendix B, App. 47, n.1.

The Pennsylvania Supreme Court has authority to hear "any final order of the Commonwealth Court." Pa. R.A.P. 1112(a). Whether the Pennsylvania Supreme Court hears an appeal is within the discretion of the Pennsylvania Supreme Court, given the circumstances of this matter as it existed below. Pa. R.A.P. 1112; 42 Pa. C.S. §724.

The authority of this Honorable Court to hear appeals from state courts is controlled by 28 U.S.C. §1257, which provides in pertinent part,

> § 1257. State courts; certiorari
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

It is Petitioners' burden to affirmatively show that this Honorable Court has jurisdiction to hear an appeal. *Gorman v. Washington University,* 316 U.S. 98, 101 (1942); *Johnson v. California*, 541 U.S. 428, 431 (2004) (explaining that "[c]ompliance with the provisions of §1257 is an essential prerequisite to our deciding the merits of a case brought here under that section. It is our obligation to raise any question of such compliance on our own motion, even though counsel has not called our attention to it").

> It was the purpose of the Judiciary Act of February 13, 1925, as well as that of all its predecessors, that no decision of a state court should be brought here for review either by appeal or certiorari until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted.

Gorman, 316 U.S. at 100-01; *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.*, 252 U.S. 341 (1920) (dismissing appeal when Fourteenth Amendment was mentioned only at trial court, but no mention was made of it in

the assignment of errors to the Supreme Court of the State); *see Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190, 194-95 (1925) (explaining that "there is nothing . . . which justifies this Court in ignoring or setting aside a required from [sic] of practice under the appellate statutes of the State by which federal constitutional rights, as well as state constitutional rights, may be asserted in the Supreme Court of the State or be held to be waived, if the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by that court").

In order for this Honorable Court to review a state-court judgment, the judgment must be final in that "it must be subject to no further review or correction in any other state tribunal. . . . As we have recognized, the finality rule 'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) *quoting Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945); *Costarelli v. Massachusetts*, 421 U.S. 193, 197 (1975) (dismissing case for lack of jurisdiction where petitioner failed to properly preserve issue for appeal; explaining that "the requirement that we review only final judgments of highest available state courts is to prevent our interference with state proceedings when the underlying dispute may be otherwise resolved"; a "federal constitutional claim is a matter of federal constitutional law, for determination initially in state courts and ultimately by this Court" and a failure to properly preserve a claim "does not mean that . . . [a petitioner] may draft his own rules of procedure in order to raise the claim only before those . . . courts which he deems appropriate"); *see also Sandquist v. California*, 419 U.S. 1066 (1974); *Banks v. California*, 395 U.S. 708 (1969). When a petitioner does not submit his or her claims of error to the

highest court in the state in which a decision in the suit could be had, the petitioner does not properly invoke the jurisdiction of this Honorable Court. *Stratton v. Stratton*, 239 U.S. 55, 56 (1915) (dismissing appeal for want of jurisdiction; explaining that even where the jurisdiction of a state's highest court is not imperative, but discretionary, failure to appeal alleged errors to the state's highest court "invites us [this Honorable Court] to assume jurisdiction by exercising an authority which we have not, that is, by indulging in conjecture as to what would or would not have been the judgment of the Supreme Court . . . [of the State] if it had been called upon to exert the discretion vested in it by state laws"); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (explaining that "in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenges, since the statutes may be construed in a way which saves their constitutionality").

In the instant matter, Petitioners did not appeal to the Pennsylvania Supreme Court the issues of whether the discovery rule and 42 Pa. C.S. §5524(2), as applied and interpreted by the Commonwealth Court of Pennsylvania, violated the Equal Protection Clauses and/or the Due Process Clause of the United States Constitution. Petitioners voluntarily abandoned these arguments, as noted in their Petition for Allowance of Appeal to the Pennsylvania Supreme Court. Since the errors as now alleged by the Petitioners in their Petition for a Writ of Certiorari were not presented to the highest court of Pennsylvania for consideration, Petitioners cannot invoke the jurisdiction of this Honorable Court to review the arguments that they abandoned and waived. It would be a clever maneuver indeed if a party could raise issues on appeal to a State's intermediate appeal

court, fail to raise those arguments in an appeal to the State's highest court, save a novel issue for which the State's highest court declines to hear the case under principles of discretionary review, then re-raise all issues before this Honorable Court seeking a ruling on issues not even presented for consideration to the State's highest court. Petitioners have not and cannot establish their burden of demonstrating that this Honorable Court's jurisdiction is properly invoked as to Petitioners' arguments based on the Due Process and Equal Protection Clauses of the United States Constitution. Additionally, Petitioners have failed to preserve their survival claim, which they voluntarily abandoned before the Pennsylvania Supreme Court. Therefore, the Gelsinger Respondents respectfully request that Petitioners' Petition for a Writ of Certiorari be denied to the extent that Petitioners claim a violation of their rights protected by the Due Process and Equal Protection Clauses of the United States Constitution and to the extent Petitioners continue to claim any errors related to their previously abandoned survival action.

II. Review Of Petitioners' Fourteenth Amendment Privileges And Immunities Challenge Is Not Warranted As Petitioners Seek To Re-Write 133 Years Of Jurisprudence And Application Of The Privileges And Immunities Clause, Under The Instant Facts, Is Doubtful At Best

Petitioners claim that their alleged "right" to the tolling effects of the discovery rule has been violated under the Privileges and Immunities Clause of the Fourteenth Amendment. This Honorable Court should not entertain Petitioners' argument, which is dubious at best given the factual circumstances presented.

The Privileges and Immunities Clause of the Fourteenth Amendment protects those privileges and immunities of citizens of the United States, while the Privileges and Immunities Clause of Article Four, Section Two of the United States Constitution protects those privileges and immunities that are fundamental to citizenship in the several States. *Slaughter-House Cases*, 83 U.S. 36, 74-80 (1873). Among those rights that may be protected by implied guarantees of the Constitution is the right "to come to the . . . courts of justice in the several States." *Slaughter-House Cases*, 83 U.S. at 79. The States, however, may regulate and restrict certain rights of citizens as "the entire domain of the privileges and immunities of citizens of the States . . . lay within the constitutional and legislative power of the States, and without that of the Federal government." *Id.* at 77. Moreover, States have an interest in fashioning their own rules of tort law, which "is paramount to any discernable federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. California*, 444 U.S. 277, 282 (1980). The Fourteenth Amendment's Privileges and Immunities Clause "only prevents a state from establishing or enforcing a law which abridges the privileges and immunities of federal citizenship." *Avins v. Hannum*, 497 F. Supp. 930, (E.D. Pa. 1980). This Honorable Court, in *Slaughter-House Cases*, rejected the argument that the privileges and immunities of citizens of a state, whatever they all may be and "subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole," were transferred by the Fourteenth Amendment from state protection to federal protection. *Slaughter-House Cases*, 83 U.S. at 76; *Meadows v. Odom*, 356 F. Supp. 2d 639, 642 (M. D. La. 2005) (explaining that the reach of the privileges and immunities clause of the Fourteenth Amendment has been narrowed, and the

clause protects only uniquely federal rights to interstate travel, the right to enter federal lands, or the rights of a citizen while in federal custody); *Galahad v. Weinshienk*, 555 F. Supp. 1201 (D. Colo. 1983) (explaining that not in a single instant in over 100 years has the Privileges and Immunities Clause of the Fourteenth Amendment been an effective restraint on state legislation).

The sole purpose of the Article Four, Section Two, Privileges and Immunities Clause is,

> to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

Slaughter-House Cases, 83 U.S. at 77.

Petitioners claimed "right" to application of the discovery rule pursuant to the Privileges and Immunities Clause of the Fourteenth Amendment is not a right unique to federal citizenship or even a right of United States citizenship. This Honorable Court has already upheld federal statutes of limitation that do not permit tolling via the discovery rule. *See TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001). Therefore, the discovery rule is not a privilege or immunity of citizenship of the United States.

The discovery rule has never been noted as being a privilege or immunity of federal citizenship. While leave to seek redress in the courts of justice in the several States has been noted as a possible right of federal citizenship, this Honorable Court has already ruled that such rights may be limited or abrogated by a State's legislature consistent with due process. *See Logan v. Zimmerman*, 455

U.S. 422, 437 (1982); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945); *Martinez v. California*, 444 U.S. 277, 282 (1980). To accept Petitioners' argument would be to overturn one hundred and thirty-three years of precedent in the form of the *Slaughter-House Cases* and render every statute of limitations or statute of repose unconstitutional as an interference with a United States citizen's access to the courts of justice. Accordingly, no compelling reason exists for this Honorable Court to grant Petitioners' Petition for a Writ of Certiorari.

III. Assuming *Arguendo*, That This Honorable Court Will Entertain Petitioners' Due Process Assignment Of Error, Review Is Not Warranted Because There Are No Conflicting Decisions Of Other State Courts Of Last Resort Or United States Courts Of Appeals And The Contours Of The Due Process Clause As It Relates To A State Statute Of Limitations Have Been Addressed By This Court

Petitioners request that this Honorable Court deem access to state courts a fundamental right, such that any infringement of the right must satisfy strict scrutiny under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Simply put, Petitioners' argument, taken to its logical end, would deem many statutes of repose unconstitutional and require application of the discovery rule to nearly every statute of limitation.

A state statute of limitations satisfies the Due Process Clause of the Fourteenth Amendment so long as a party is given a meaningful time to present a claim in a meaningful manner. *Logan v. Zimmerman*, 455 U.S. 422, 437

(1982). This Honorable Court, in *Logan*, explained, however, that,

> Obviously, nothing we have said entitles every civil litigant to a hearing on the merits in every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, or, in an appropriate case, filing fees. And the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule.

Logan, 455 U.S. at 437 (citations omitted, emphasis in the original).

Statutes of limitations are in some sense arbitrary, *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 555 (3d Cir. 1985), however, "[w]hile it is undeniably true that access to the courts and an opportunity to be heard are fundamental aspects of procedural due process, it is equally clear that the bar imposed by a validly enacted and reasonable statute of limitations does not deprive a suitor of his day in court in derogation of that clause," *Saffioti v. Wilson*, 392 F. Supp. 1335, 1339 (S.D. NY 1975). *See Ciccarelli*, 757 F.2d at 555 (explaining that statutes of limitation occasionally expire before a claimant knows that he has sustained an injury, "[s]uch a statute does not violate due process if the limitations period is otherwise reasonable"; also ruling that the statute of limitations was reasonable for wrongful death and survival actions). This Court has enunciated,

> Statutes of limitation find their justification in necessity and convenience rather than logic. They represent expedients, rather than principles. They are practical and pragmatic devices to

> spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between just and unjust claims, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual.
>
> * * *
>
> This Court . . . adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights.

Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (citations omitted).

A State has an interest in fashioning its own rules of tort law, which "is paramount to any discernable federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. California*, 444 U.S. 277, 282 (1980). The discovery rule is not a general rule applicable across all contexts. *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001) (Scalia and Thomas, JJ., concurring) (explaining that it is not a general rule that a statute of limitations begins to run when a party knows or has reason to know that she was injured, i.e. the discovery rule, but rather begins to run when the plaintiff has the right to apply to the court for relief – noting the discovery rule is "bad wine of recent vintage"). The discovery rule

has been applied by this Honorable Court in limited circumstances "where the cry for [such a] rule is loudest," i.e. latent disease and medical malpractice cases, and where Congress has permitted it. *TRW Inc.*, 534 U.S. at 27 (reversing Ninth Circuit holding that discovery rule is read into every federal statute of limitations).

This Honorable Court need not undertake review of whether due process requires application of the discovery rule as Petitioners suggest because this Court has already established the boundaries of due process as it relates to statutes of limitation and the discovery rule. Federal and state courts have ruled in accord with this Court's pronouncement.[4] Petitioners' suggestion that there is a great

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[4] *See Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 555 (3d Cir. 1985); *Fields v. Legacy Health Sys.*, 413 F.3d 943, 954-956 (9th Cir. 2005) (applying rational basis review to equal protection and due process change to statute of limitations and repose in wrongful death case, explaining that "for the purposes of substantive due process review, state actions that implicate anything less than a fundamental right require only that the government demonstrate 'a *reasonable relation* to a legitimate state interest to justify the action.' *Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004) (*per curiam*), *cert. denied*, 160 L. Ed. 2d 25, 125 S. Ct. 56 (2004) (*quoting Washington v. Glucksberg*, 521 U.S. 702, 722, 138 L. Ed. 2d 772, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997). This is the appropriate standard of review for this case as Oregon's wrongful death statutes do not implicate any of the 'personal activities and decisions' the Supreme Court has identified as being 'deeply rooted in our history and traditions' or 'fundamental to our concept of constitutionally ordered liberty'"); *Brubaker v. Cavanaugh*, 741 F.2d 318, 320-21 (10th Cir. 1984) (explaining that argument that some reasonable time must be allowed for filing an action following discovery of an injury must be rejected, *citing Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945), and upholding limitations period challenged on due process and equal protection grounds); *Anderson v. Wagner*, 402 N.E. 2d 560, 568 (Ill. 1979) (holding four (4) years statute of repose reasonable and explaining that "any statute of limitations will eventually operate to bar a remedy and the time within which a claim

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split of authority among the States on whether the discovery rule must be applied under the federal due process standard is erroneous. Those cases cited in Petitioners' Petition for a Writ of Certiorari for the proposition that the lack of application of the discovery rule or the application of a statute of limitations violated a plaintiff's right to redress in violation of due process are all based on the interpretation of individual State's constitutional provisions, not the Fourteenth Amendment's Due Process Clause.[5] Accordingly, no compelling reason exists for this

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should be asserted is a matter of public policy, the determination of which lies almost exclusively in the legislative domain"); and *Musk v. Nelson*, 647 A.2d 1198, 1202 (Me. 1994) (upholding under due process challenge three (3) year statute of limitations and explaining that in order to be found unconstitutional the statute of limitations must impose a time limit so unreasonable as to deny meaningful access to the judicial process and ruling that "[l]imiting the availability of the discovery rule bears a rational relationship to the Legislature's goal").

[5] *See Burgess v. Eli Lilly and Company*, 609 N.E. 2d 140, 141 (Ohio 1993) (ruling that under Ohio Law, this court held that knowledge of the injury's cause is a part of the knowledge required before a statute of limitations may begin to run and explaining that this court based its ruling on the right-to-remedy clause of the Ohio Constitution); *Burgess v. Eli Lilly & Company*, 995 F.2d 646 (6th Cir. 1993) (applying the doctrine in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S. Ct. 817 (1938), the Sixth Circuit certified a state constitutional question to the Ohio Supreme Court resulting in the ruling of *Burgess v. Eli Lilly and Company, supra.*); *Lillicrap v. Martin*, 591 A.2d 41, 48 (Vt. 1989) (ruling that medical malpractice statute of repose of seven years inapplicable based on timing of enactment of new statute of limitations and repose for medical malpractice actions, plaintiff argued that the statute was invalid based on Chapter I, Article 4 of the Vermont Constitution); and *Nelson v. Krusen*, 678 S.W. 2d 918, 921 (Tex. 1984) (holding based on the Texas Constitution's "open courts" provision, Art. I, sec. 13, deeming consideration of arguments raised under Fourteenth Amendment, due process and equal protection unnecessary).

Honorable Court to grant Petitioners' Petition for a Writ of Certiorari because no decisions by other State courts of last resort conflict with the decision of the Pennsylvania Supreme Court.

IV. Assuming *Arguendo*, That This Honorable Court Will Entertain Petitioners' Equal Protection Assignment Of Error, Review Is Not Warranted Because There Are No Conflicting Decisions Of Other State Courts Of Last Resort Or United States Courts Of Appeals

Petitioners claim that this Honorable Court should entertain an equal protection challenge to 42 Pa. C.S 5524(2) [Limitation of Time; Civil Actions and Proceedings; Two year limitation] because the discovery rule is applied to personal injury actions in Pennsylvania, but not wrongful death and survival actions. Petitioners claim that this equal protection challenge should be analyzed under strict scrutiny, not rational basis review.

This Honorable Court has already ruled that a statutory entitlement to sue for wrongful death is not a fundamental right, *Parham v. Hughes*, 441 U.S. 347, 358 n.12, (1979) (explaining that "[i]t cannot seriously be argued that a statutory entitlement to sue for wrongful death of another is itself a 'fundamental' or 'constitutional' right"), let alone the application of the discovery rule to a wrongful death statute of limitations. Moreover, contrary to Petitioners' argument, rational basis review has repeatedly been held to be the proper standard of review for an Equal Protection Clause challenge to a statute of limitations or lack of application of the discovery rule to a statute of

limitations.[6] Despite Petitioners' suggestion in their Petition for a Writ of Certiorari that there is a great split of authority on whether extinguishing claims without application of the discovery rule violates equal protection under the Fourteenth Amendment to the United States Constitution, those cases cited by Petitioners for the proposition that equal protection is violated when the discovery rule is not applied to a statute of limitations are inapposite.[7] Petitioners' request for review need not be

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[6] *Cadieux v. International Telephone & Telegraph Corp.*, 593 F.2d 142 (1st Cir. 1979) (holding that rational basis review applies to Equal Protection challenge to non-application of discovery rule to wrongful death action); *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548 (3rd Cir. 1985) (applying rational basis review to equal protection challenge to two years statute of limitations which did not permit tolling via the discovery rule); *Harrison v. Schrader*, 569 S.W. 2d 822, 825 (Tenn. 1978) (applying rational basis review to Fourteenth Amendment challenge to statute of repose); *Hawley v. Green*, 788 P.2d 1321, 1324 (Idaho 1990) (upholding two years statute of limitations in medical malpractice actions because limitations period was rationally related to preventing fraudulent and stale claims, applying rational basis analysis); *Craven v. Lowndes County Hospital Authority*, 437 S.E. 2d 308, 310 (Ga. 1993) (applying rational basis review to challenge to five (5) year statute of repose in medical malpractice actions); *Bonin v. Vannaman*, 929 P.2d 754, 767-68 (Kan. 1996) (upholding statute of repose on equal protection challenge, rational basis review applied); and *Adams v. Arthur*, 969 S.W. 2d 598, 616 (Ark. 1998) (same).

[7] *Martin v. Richey*, 711 N.E. 2d 1273, 1280, 1285 (Ind. 1999) (holding two (2) years statute of limitations violated privileges and immunities clause of Indiana Constitution, Art. I, sec. 23, as applied to plaintiff under case specific facts, but explaining that " . . . we concluded that nothing compels the application of a federal equal protection analytical methodology to claims under Section 23, and that courts should give Section 23 independent interpretation and application"); *DeYoung v. Providence Medical Center*, 960 P.2d 919, 922 (Wash. 1998) (holding eight (8) years statute of repose unconstitutional based on Washington Constitution, Art. I, sec. 12, and explaining that "[s]he [the plaintiff] maintains that the right to a civil remedy in tort actions is a matter of state and not federal concern and whether the discovery rule

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heard when several courts have already ruled consistently in deciding whether the discovery rule must be applied to a statute of limitations under an equal protection challenge.[8]

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can be denied to some but not all individuals is a matter of local concern. Providence [the defendant] concedes that both these factors favor independent state analysis"); *Whitlow v. The Board of Education of Kanawha County*, 438 S.E. 2d 15, 23 (W. Va. 1993) (holding as a violation of equal protection under West Virginia Constitution's Equal Protection Clause, Art. X, sec. III, two different statutes of limitation for filing suit against a private entity and a political subdivision); *Anson v. American Motors Corp.*, 747 P.2d 581 (Ariz. 1987) (holding that Arizona Constitution requires discovery rule application to wrongful death cases based on *Kenyon v. Hammer*, 688 P.2d 961 (Ariz. 1984), discussed *infra.*); *Opinion of the Justices*, 493 A.2d 1182 (N.H. 1985) (holding proposed legislation would violate New Hampshire Constitution, Pt. I, Articles 2 and 12, i.e. equal protection, if suits against state did not have tolling effects of discovery rule when suits against private entities would); *Austin v. Litvak*, 682 P.2d 41, 50 (Colo. 1984) (explaining in a plurality opinion that the statutory exceptions which permit "foreign object" and "knowing concealment" claimants but not "negligently misdiagnosed" plaintiffs in medical malpractice actions to avoid the three-year statute of repose and to invoke the discovery rule are without a reasonable basis in fact in violation of equal protection under Colorado Constitutional guarantees); *Kenyon v. Hammer*, 688 P.2d 961, 963-66 (Ariz. 1984) (holding statute of limitations unconstitutional based on State's "open court" provision, explaining that "the statute violates Article 2, §13 of the Arizona Constitution. That holding and the opinion which follow are based entirely on State constitutional grounds . . . ." and finding that "[i]nstead of an open court provision, Arizona has a more specific and stronger requirement"); and *Carson v. Maurer*, 424 A.2d 825, 830-31 (N.H. 1980) (holding that equal protection challenge to statute of limitations requires substantial relationship tested, not rational basis review, based on New Hampshire Constitution, and explaining that "[w]e recognize that recently the United States Supreme Court has restricted its application of this substantial relationship test to cases involving classifications based upon gender and illegitimacy. * * * In interpreting our State Constitution, however, we are not confined to federal constitutional standards and are free to grant individuals more rights than the Federal Constitution requires").

[8] *See Crier v. Whitecloud*, 496 So. 2d 305 (La. 1986); *Harlfinger v. Martin*, 754 N.E. 2d 63 (Mass. 2001); *Cummings v. X-Ray Associates of*

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Accordingly, no compelling reason exists for this Honorable Court to grant Petitioners' Petition for a Writ of Certiorari because no decisions by other State courts of last resort conflict with the decision of the Commonwealth Court of Pennsylvania.

CONCLUSION

For the foregoing reasons, Respondents Melvin C. Gelsinger, Gale Gelsinger, Esther Gelsinger, and Clarence D. Gelsinger respectfully request that this Honorable Court deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

In The

Commonwealth Court of Pennsylvania

1788 CD 2004

RUSSELL PENNOCK AND ANTOINETTE PENNOCK, in their individual capacities and on behalf of the estate of DANIEL PENNOCK,

Appellants,

v.

RICHARD V. LENZI AND CARMINE D. LENZI, in their individual capacities and dba RIDGE CREST FARMS, MELVIN C. GELSINGER, GALE GELSINGER, ESTHER GELSINGER, CLARENCE D. GELSINGER, RETTEW ASSOCIATES, INC., BERKS COUNTY CONSERVATION DISTRICT AND THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

Appellees.

Appeal from the Order dated July 26, 2004, in the Court of Common Pleas, Dauphin County, at No. 2003 CV 848.

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Statement of Jurisdiction

This Honorable Court has jurisdiction to review the final Orders of the Court of Common Pleas, Dauphin County (which itself had jurisdiction under Title 42, Chapter 85 of the Consolidated Statutes), pursuant to 42 Pa.C.S.A. § 762(a)(1)(i) and Pa.R.A.P. 341(a), (b)(3), and (c).

Orders in Question

The Orders in question are those entered by the Court of Common Pleas, Dauphin County, on October 14 (Appendix 4)[1] and December 16 (A.3), 2003, and June 30, 2004 (A.2), the texts of which said:

> MEMORANDUM ORDER: AND NOW, this 14th day of October 2003, upon consideration of the Preliminary Objections submitted by Defendants Lenzi, Gelsinger and Berks County Conservation District, the parties' legal memoranda, and oral argument held September 18, 2003, IT IS HEREBY ORDERED that Defendants' Preliminary Objection to Plaintiffs' Complaint on the basis that Plaintiffs' claims are barred by the two-year statute of limitations is SUSTAINED. . . . Further, based on this court's ruling resulting in the dismissal of Plaintiffs' claims, all other

[1] Pursuant to Pa.R.A.P. 2111(b) and (c), the Orders of the trial Court and the Complaint are attached to this brief as Appendix items 1-5. Hereafter, citations to (A._) refer to Appendix documents by number.

preliminary objections raised by Defendants are deemed moot.

ORDER: AND NOW, this 16th day of December 2003, upon consideration of the Plaintiffs' Petition for Clarification as to the Memorandum Order of October 14, 2003, IT IS HEREBY ORDERED that plaintiffs' petition is GRANTED. It was this court's intent in its previous order dated October 14, 2003 that the preliminary objections submitted by Defendants Lenzi, Gelsinger and Berks County Conservation District be sustained, thus disposing of plaintiffs' claims against these particular defendants. The preliminary objections submitted by Defendant Rettew Associates, Inc. are still pending before this court and are presently scheduled for the January 2004 Argument Court Session.

ORDER: AND NOW this 30th day of June, 2004, the Preliminary Objections filed by Defendant Rettew Associates, Inc. are hereby SUSTAINED. Plaintiffs' Complaint is dismissed as to the moving defendant, with prejudice.

Scope of Review and Standards of Review

The scope of review of the Orders of October 14 (A.4) and December 16 (A.3), 2003, encompasses the Complaint and the trial Court's decision that *Pastierik v. Duquesne Light Co.*, 514 Pa. 517, 526 A.2d 323 (1987) required dismissal under the statute of limitations (42 Pa.C.S.A. § 5524(2)) despite plaintiffs' constitutional rights.[2] *Allegheny County Sportsmen's League v. Rendell*, 860 A.2d 10,

[2] Defendants improperly raised their statute of limitations defense in preliminary objections (*see* Pa.R.C.P. 1028(a)(4) *Note*), but the trial Court heard argument and ruled as if on preliminary objections.

2004 WL 2347782 (Pa. 2004). The standard of review is plenary and requires this Court to accept all allegations in the Complaint and reasonable inferences therefrom as true. *Barra v. Rose Tree Media School Dist.,* 858 A.2d 206, 211-14 (Pa.Cmwlth. 2004); *Insurance Adjustment Bureau Inc. v. Allstate Ins. Co.,* ___ A.2d ___ , 2004 WL 2190128, *2 (Pa.Super. 2004); *Citicorp North America Inc. v. Thornton,* 707 A.2d 536, 538 (Pa.Super. 1998).

The scope of review of the Order of June 30, 2004 (A.2), encompasses the Complaint and the trial Court's decision that plaintiffs failed to allege duty, breach, or causation against defendant Rettew Associates Inc. as a matter of law. *Allegheny County Sportsmen's League,* 860 A.2d 10. The standard of review is plenary and requires this Court to accept all allegations in the Complaint and reasonable inferences therefrom as true. *Insurance Adjustment Bureau Inc.,* 2004 WL 2190128, *2. Finally, this Court reviews the trial Court's denial of plaintiffs' request for leave to amend for abuse of discretion. *Blaine v. York Financial Corp.,* 847 A.2d 727, 728 (Pa.Super. 2004).

Statement of Questions Involved

I. Does extinguishment of wrongful death and survival claims before plaintiffs could discover the culprits violate the Remedies, Due Process, or Equal Protection Clauses of the Pennsylvania Constitution or the Privileges and Immunities, Due Process, or Equal Protection Clauses of the U.S. Constitution?

Implicitly negatived below by adhering to *Pastierik v. Duquesne Light Co.,* 526 A.2d 323, 514 Pa. 517 (1987), in which the Pennsylvania Supreme Court (without addressing

the constitutional arguments) ruled that wrongful death claims accrue at death, and survival claims accrue at the latest at death.

II. Does a Complaint that asserts that an engineering firm was "hired to oversee" agricultural operations that allegedly caused death state a claim, and if not, should plaintiffs be allowed to take discovery and amend their Complaint?

Negatived below.

Statement of the Case

A. Statement of the Form of the Action and Procedural History

Plaintiffs Russell and Antoinette Pennock and the Estate of Daniel Pennock filed their Complaint (A.5) as a civil action in the Court of Common Pleas, Dauphin County, docket no. 2003 CV 0848, on February 21, 2003. Count I is a wrongful death claim under 42 Pa.C.S.A. §8301 stemming from the death of 17-year-old Danny Pennock on April 1, 1995. Count II is a survival claim under 42 Pa.C.S.A. § 8302.

Defendants Richard V. Lenzi, Carmine D. Lenzi, Ridge Crest Farms, Melvin C. Gelsinger, Gale Gelsinger, Esther Gelsinger, and Clarence D. Gelsinger filed preliminary objections on March 18, 2003. Defendant Rettew Associates Inc. filed preliminary objections on April 7, 2003. Defendant Berks County Conservation District filled preliminary objections on April 11, 2003.

On October 14, 2003 (A.4), the trial Court granted a preliminary objection of the Gelsingers, Lenzis, Ridge Crest Farms, and Berks County Conservation District, dismissing the Complaint as to those defendants only on the ground of the statute of limitations. On December 16, 2003 (A.3), the trial Court clarified its Order of October 14 without altering its substance.

On June 30, 2004 (A.2), the trial Court granted a preliminary objection of Rettew Associates, dismissing the Complaint as to that defendant only for failure to state a claim. In light of its prior ruling on the statute of limitations, the Court denied plaintiffs' request for leave to amend their Complaint against Rettew.

Although the Complaint has not been disposed of as to defendant Pennsylvania Department of Environmental Protection (DEP), on July 26, 2004, the trial Court granted plaintiffs' petition for a determination of finality under Pa.R.A.P. 341(c) (A.1.) In the petition, plaintiffs' pledged to dismiss DEP voluntarily if they are ultimately unsuccessful in their effort to overturn the trial Court's statute of limitations ruling. The trial Court's finality determination made its prior Orders of October 14 and December 16, 2003, and June 30, 2004, appealable as final orders as of July 26, 2004. Plaintiffs filed their Notice of Appeal in this Honorable Court on August 24, 2004.

B. Statement of Prior Determinations

Other than the Orders of the Court of Common Pleas, Dauphin County, identified above, there are no prior determinations in this case.

C. Judges Whose Determinations Are To Be Reviewed

The Hon. Richard A. Lewis issued the Orders of October 14 and December 16, 2003. The Hon. Jeannine Turgeon issued the Orders of June 30 and July 26, 2004.

D. Statement of the Facts[3]

This case arose from the death of 17-year-old Danny Pennock, who died from mysterious infections in April 1995 after prolonged exposure to sewage sludge from a neighboring farm. Sewage sludge is sludge derived from municipal sewage treatment systems and from commercial, industrial, and residential septic and holding tanks. 25 Pa. Code § 271.1. Under the "beneficial use" program of the U.S. Environmental Protection Agency (EPA), which DEP administers at the state level, sewage sludge is spread as fertilizer on farmland and mine reclamation sites. Class B sewage sludge is sludge treated by a lime stabilization process that is supposed to reduce the pathogens naturally present in sludge thanks to its source. (Complaint ex. D, pp. 1-2.)

According to former EPA microbiologist Dr. David L. Lewis, rotaviruses and staphylococcus aurea ("staph") bacteria can be contracted from "prolonged exposure to the dust and fumes emitted from the pathogens found in Class B sewage sludge." (Complaint, p. 13, ¶ 68.) "The lime stabilization process used to treat Class B sewage sludge prior to land application has the effect of, when the lime dust is inhaled, opening and exposing an individual's lungs in the mucus membrane and the mouth and throat areas so that the individual is more susceptible to these

[3] As the trial Court resolved this case entirely on preliminary objections, the Statement of the Facts is drawn from the Complaint.

pathogens. As a result, skin and respiratory problems develop, such as skin irritation, difficulty in breathing, congestion, burning lungs, coughing and sinusitis, and from these, the infections occur." (*Id.*, p. 14, ¶¶ 70-71.) Staph and rotavirus infections contracted from sludge can lead to death. (*Id.* p. 13, ¶ 67.)

On September 25, 1987, defendant Richard V. Lenzi (doing business as Ridge Crest Farms) received a permit from DEP (then called the Department of Environmental Resources) to operate a class B sludge processing and disposal facility in Heidelberg Township, Berks County. (Complaint, p. 5, ¶ 13.) The permit allowed Lenzi to apply sludge only to certain farmland owned by defendant Melvin C. Gelsinger, also in Heidelberg Township, called Gelsinger Farms. (*Id.* ex. A.).

According to the Complaint, Lenzi hired defendant Rettew Associates Inc. "to oversee the sludge process conducted by Ridge Crest Farms and the application of sludge at the Gelsinger farms." (Complaint, p. 7, ¶ 7.) Ridge Crest Farms began applying sludge to Gelsinger Farms in 1988 and ceased applying sludge there sometime in 1995. During this period, DEP cited Ridge Crest Farms and Richard Lenzi at least three times for violating Pennsylvania regulations concerning the land application of sludge. (*Id.*, p. 10, ¶¶ 41, 42, 46.)

Plaintiffs allege that during the relevant time period, Pennsylvania regulations required defendants to mark the land that was receiving sludge, notify neighbors 30 days in advance of land application, and restrict public use of or access to the sludged land for 30 days after application. (Complaint, pp. 10-11, ¶¶ 43, 47, 48.) A permit renewal dated April 14, 1993, required Lenzi and Ridge Crest

Farms to comply with all regulations, and under condition 11 specifically required that "Each permitted utilization area shall be delineated in the field, prior to each sludge application, by the use of physical markers, such as survey flags." (*Id.* ex. C, p. 4) According to the Complaint, defendants failed to comply with these regulations by not properly marking sludged land, not notifying neighbors in advance of application, and allowing plaintiff Russell and his sons Danny and Dario to hunt on recently sludged land (*Id.*, pp. 10-11, ¶¶ 44, 47-48.)

Plaintiffs Russell and Antoinette Pennock are neighbors of Gelsinger Farms in Robesonia, Pennsylvania. (Complaint, p. 3, ¶ 1; ex. D, p. 1.) On March 15, 1995, their son Danny Pennock was a healthy 17-year-old boy playing basketball at home. (*Id.*, p. 12, ¶ 58.) The next day, Danny noticed the first symptoms of an illness that hospitalized him on March 19. (*Id.* pp. 12-13, ¶¶ 59-62.) Cultures taken by the intensive care unit that day revealed that Danny had a staph infection. (*Id.* p. 13, ¶¶ 62-63.) He also had a rotavirus infection. (*Id.*, p. 13, ¶ 66.) "Daniel was ultimately intubated due to his difficulty in breathing caused by perforations that had developed in his lungs as a result of the staph infection." (*Id.* p. 13, ¶ 64.) On April 1, 1995, Danny was dead. (*Id.* p. 13, ¶ 65.)

For almost six years following Danny's death, Russell and Antoinette Pennock had no idea how Danny had contracted the infections that killed him, and no reasonable way of knowing. On February 25, 2001, the *Reading Eagle* published one of a series of articles on the topic of sewage sludge and whether its application to farm fields as fertilizer is properly regulated and safe. (Complaint, p. 14, ¶ 74; ex. G.) The article contained opinions and analysis by EPA microbiologist Dr. Lewis on the pathogens

found in sewage sludge. (*Id.* ex. G.) The series also described the illness and death of an 11-year-old boy, Tony Behun, who died after exposure to sewage sludge in Rush Township, Pennsylvania. (*Id.* p. 15, ¶ 77.) The Pennocks contacted Dr. Lewis, who "reviewed Daniel's medical records and determined that the rotavirus and staph infections found in Daniel were contracted from his prolonged exposure to the dust and fumes emitted from the pathogens found in Class B sewage sludge." (*Id.* p. 13, ¶ 68.) "It was from Dr. Lewis' analysis and the reported symptoms experienced by Tony Behun that the Plaintiffs first because aware of the link between sewage sludge and their son's death." (*Id.* p. 15, ¶ 78.) Plaintiffs filed their Complaint less than two years later, on February 21, 2003.

E. Statement of the Orders under Review

By Orders of October 14 (A.4) and December 16 (A.3), 2003, the trial Court dismissed the Complaint against Ridge Crest Farms, the Lenzis, the Gelsingers, and the Berks County Conservation District on the ground that plaintiffs' wrongful death and survival claims are stale under the two-year statute of limitations. 42 Pa.C.S.A. § 5524(2). Relying solely on *Pastierik v. Duquesne Light Co.*, 514 Pa. 517, 526 A.2d 323 (1987), the Hon. Richard Lewis rejected the Pennocks' assertion that under the discovery rule, the statute was tolled until they reasonably could have discovered the culprits in Danny's death. In *Pastierik,* the Supreme Court of Pennsylvania held that the discovery rule may not extend the time for bringing wrongful death and survival actions beyond two years after death. The *Pastierik* Court did not address whether pre-discovery extinguishment is constitutional, and neither did Judge Lewis in dismissing plaintiffs' claims.

By Order of June 30, 2004 (A.2), the trial Court dismissed the Complaint against Rettew Associates for failure to state a claim. In her opinion, the Hon. Jeannine Turgeon denied plaintiffs' request for leave to amend against Rettew, reasoning that amendment would be futile in light of the Court's prior ruling that the statute of limitations barred the claims against other defendants.

F. Statement of Place of Preservation of Issues

Plaintiffs preserved their claim that the discovery rule tolled the statute of limitations by pleading "Plaintiffs first became aware of the dangers associated with exposure to sewage sludge in February of 2001" and "It was from Dr. Lewis' analysis and the reported symptoms experienced by Tony Behun that the Plaintiffs first because aware of the link between sewage sludge and their son's death." (Complaint pp. 14, 15, ¶¶ 73, 78.) Plaintiffs preserved their assertion that the *Pastierik* interpretation of the statute of limitations violates their constitutional rights in briefs and arguments on defendants preliminary objections. (Plaintiffs' Brief in Opposition to Lenzi Defendants' and Gelsinger Defendants' Preliminary Objections to Plaintiffs' Complaint, pp. 13-23.)

Plaintiffs preserved their argument that their Complaint states a cause of action against Rettew Associates and that, if it does not, they should get a chance to amend, in briefs and arguments on Rettew's preliminary objections. (Plaintiffs' Brief in Opposition to Defendant Rettew Associates Inc.'s Preliminary Objections to Plaintiffs' Complaint, pp. 8-13.)

Summary of Argument

I. The Pennocks' Fundamental Constitutional Right to a Remedy Prevents Their Wrongful Death and Survival Claims from Accruing Until They Could Discover the Culprits

The Remedies Clause (Art. 1, § 11) and Due Process Clause (Art. 1, § 1) of the Pennsylvania Constitution give the Pennocks a fundamental right to have a remedy for their wrongful death and survival claims.[4] The Privileges and Immunities Clause of the Fourteenth Amendment of the U.S. Constitution provides identical protection. Extinguishing the wrongful death and survival claims before the Pennocks discovered them deprives them of their remedy. Because the deprivation infringes on a fundamental right – the right to a remedy – it must satisfy strict scrutiny to be constitutional. The deprivation fails to satisfy strict scrutiny because extinguishing wrongful death and survival claims before they could be discovered is not strictly necessary to serve the state interest in preventing stale and fraudulent claims. Wrongful death and survival claims can be extinguished in the statutory period after discovery just as personal injury claims are extinguished. (For the same reason, pre-discovery extinguishment fails to satisfy

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[4] Technically, the wrongful death claim belongs to the Pennocks (*Moyer v. Rubright*, 438 Pa.Super. 154, 159, 651 A.2d 1139, 1141 (1994)), meaning their constitutional rights are implicated in extinguishment of that claim. The survival claim stems from the personal injuries Danny suffered (*id.*), implicating his constitutional rights. Because the wrongful death action "is derivative of the original tortuous conduct which would have supported [Danny's] cause of action" (*id*, 438 Pa.Super. 162, 651 A.2d at 1142) and serves the purpose of remedying damages caused by his death, extinguishing the wrongful death claim implicates Danny's constitutional rights too.

intermediate scrutiny, the level of review applicable to the Pennocks' right to a remedy against DEP.) Without such narrow tailoring, the fundamental right to a remedy becomes empty, providing the Pennocks no more protection than they would have received in the absence of the pertinent constitutional provisions.

II. The Pennocks' Complaint States a Claim against Rettew Associates and Should Be Reinstated, or Should Be Amended after Discovery

The Pennocks' Complaint inferentially alleges that Rettew had a duty to anyone who could foreseeably be harmed by the sludging process by virtue of its contractual arrangement to oversee the whole process for Ridge Crest Farms. (Complaint p. 7, ¶ 25.) The Complaint specifically alleges wrongful conduct and omissions that riddled the sludging process (*Id.* pp. 8-9, 10-11, ¶¶ 31-36, 41-42, 44, 46-48) and caused the infections that killed Danny (*Id.* pp. 13-14, 1548, ¶¶ 66-72, 80, 82-88, 90-93.) If this is insufficient to allege duty, breach, and causation, the Court should give the Pennocks a chance to amend their Complaint against Rettew after conducting preliminary discovery. A DEP investigation report attached to the Complaint says an independent contractor oversaw "the whole process" (complaint ex. D, p. 2), and Rettew undeniably filed permit applications and reports for Ridge Crest Farms (*id.* pp. 7, 8, ¶¶ 25, 29-30). There has been no discovery in this case, so the Pennocks are ignorant of the full extent of Rettew's duties and responsibilities.

Argument

I. The Pennocks' Fundamental Constitutional Right to a Remedy Prevents Their Wrongful Death and Survival Claims from Accruing Until They Could Discover the Culprits

The Pennsylvania statute of limitations for wrongful death, survival, and personal injury claims is identical:

> The following actions and proceedings must be commenced within two years:
>
> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

42 Pa.C.S.A. § 5524(2). The statute also provides: "The time within which a matter must be commenced . . . shall be computed from the time the cause of action accrued." 42 Pa.C.S.A. §5502(a).

Personal injury claims accrue under this statute of limitations when the plaintiff discovers, or should discover with the exercise of reasonable diligence, the fact of injury, the culprit, and the causal relationship between the wrongful conduct and injury. *Moyer v. Rubright*, 438 Pa. Super. 154, 160, 651 A.2d 1139, 1142 (1994); *Petri v. Smith*, 307 Pa.Super. 261, 270-71, 453 A.2d 342, 346-47 (1982). The two-year limitation runs from that point of accrual. Ascertaining the time of accrual – the time at which the plaintiff reasonably should have discovered he was injured by wrongful conduct – is usually a question of fact for the jury. *White v. Owens-Corning Fiberglass Corp.*, 668 A.2d 136, 447 Pa.Super. 5 (1995); *Petri*, 307 Pa.Super. at 271-72, 453 A.2d at 347.

Interpreting the exact same language of the exact same statute, the Pennsylvania Supreme Court ruled in *Pastierik v. Duquesne Light Co.*, 514 Pa. 517, 526 A.2d 323 (1987) that claims for wrongful death accrue at death, regardless of plaintiff's blameless ignorance of injury, cause, or culprit. *Id.*, 514 Pa. at 520, 526 A.2d at 325. Likewise under *Pastierik*, survival actions become stale, at the latest, two years after death (*id.*, 514 Pa. at 522, 526 A.2d at 326), even though prior to death, claims for the same injuries are tolled during the period of reasonable ignorance. *Moyer v. Rubright*, 438 Pa. Super. at 160, 651 A.2d at 1142.

Plaintiffs respectfully argue that the *Pastierik* Court's interpretation of the statute of limitations, upon which the trial Court solely relied to bar plaintiffs' claims by Order of October 14, 2003, violates the U.S. and Pennsylvania Constitutions and, even if not, is wrong as a matter of Pennsylvania law.[5]

A. A Remedy for Wrongful Death and Survival Claims is a Fundamental Right under the Pennsylvania and U.S. Constitutions

Accepting the allegations and all reasonable inferences in the Complaint, the Pennocks cannot reasonably be expected to have discovered their wrongful death and

[5] Some courts speak loosely of the discovery rule as a judicial construction. The Pennsylvania Supreme Court has rejected this notion, recognizing that the discovery rule is matter of judicial interpretation of statutes of limitation, specifically of the time of accrual under such statutes. *Gustine Uniontown Associates Ltd. v. Anthony Crane Rental Inc.*, 577 Pa. 14, 33, 842 A.2d 334, 346-47 (2004); *Anthony v. Koppers Co. Inc.*, 496 Pa. 119, 123, 436 A.2d 181, 183 (1981).

survival claims until sometime after they saw the *Reading Eagle* article on sewage sludge on February 25, 2001. (Complaint pp. 14-15, ¶¶ 73-78; ex. G). This was almost six years after Danny died, and four years after expiration of the two-year limitations period, if not tolled until discovery. Under *Pastierik,* the courtroom doors were closed to the Pennocks before they had any reason to open them. They did not know who to sue within two years after Danny's death.

The Remedies Clause in the Pennsylvania Constitution protects a right to a remedy for injuries: "[E]very man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law." PA. CONST. Art. 1, § 11. In Pennsylvania, this mandatory language creates a fundamental right to a remedy because it is "found in the Constitution." *James v. SEPTA,* 505 Pa. 137, 146, 477 A.2d 1302, 1306 (1984). In *James,* for example, the Supreme Court of Pennsylvania held that the right to sue the Commonwealth is important under the Remedies Clause, but is not fundamental because it is qualified by the second sentence of Art 1, § 11. *Id.,* 505 Pa. at 146-147, 477 A.2d at 1306. The right to a remedy against private parties is not qualified by the second sentence of Art 1, § 11, and so is fundamental by virtue of the unqualified language in the first sentence. *See Kelly v. Brenner,* 317 Pa. 55, 59, 175 A. 845, 847 (1934) (right to have courts open and justice administered is fundamental); *Thirteenth and Fifteenth Street Passenger Railway v. Boudrou,* 92 Pa. 475, 481-82 (1880); *Greer v. United States Steel Corp.,* 237 Pa. Super. 597, 609, 352 A.2d 450, 456 (1975) (Spaeth, J., dissenting) ("I suggest that without an explicit directive from the legislature, we ought not to adopt appellant's and the majority's interpretation and

deprive an injured party of the fundamental right to resort to the courts."), *rev'd*, 475 Pa. 448 (1977).

Independently, the right to a remedy for wrongful death is fundamental under the Due Process Clause of the Pennsylvania Constitution. It says, "All men . . . have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." PA. CONST. Art. 1, § 1. In *Hatchard v. Westinghouse Broadcasting Co.*, the Supreme Court of Pennsylvania said the Due Process Claus [sic] makes the right to sue for damages to reputation fundamental in Pennsylvania. *Hatchard*, 516 Pa. 184, 193-94, 532 A.2d 346, 350-51 (1987): "In fact, we have recognized that our Declaration of Rights places reputation 'in the same class with life, liberty and property.'" *See also Moyer v. Phillips*, 462 Pa. 395, 400, 341 A.2d 441, 443 (1975). If the right to sue for damage to reputation is fundamental in Pennsylvania under Art 1, § 1, the right to sue for damage to life – i.e., a wrongful death claim – is fundamental too. There is no basis upon which to give more protection to reputation than to life under Article 1, § 1.

There is a third independent ground upon which the right to a remedy for wrongful death and survival claims is fundamental. The Privileges and Immunities Clause of the Fourteenth Amendment to the U.S. Constitution says, "No State shall make or enforce any law which shall abridge the privileges and immunities of Citizens of the United States." U.S. CONST. Amend. XIV, § 1. In *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907), the U.S. Supreme Court said, "The right to sue and defend in the courts is the alternative to force. In an organized society it

is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship."[6] *See also Stump v. Gates,* 777 F. Supp. 808, 817-19 (Dist. Colorado 1991).[7] If *Pastierik* is in conflict with this federal constitutional right, this Honorable Court is bound to comply with the federal constitution. *Commonwealth v. Beaver,* 317 Pa.Super. 88, 101, 463 A.2d 1097, 1104 (1983).

B. Extinguishing Wrongful Death and Survival Claims Prior to Discovery of Them Fails to Satisfy Strict Scrutiny

Given that wrongful death and survival claimants have a constitutional right to a remedy in Pennsylvania, there can be no serious argument that a statute of limitation infringes the remedy.[8] In a brief to the trial Court, the

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[6] It is true that the U.S. Supreme Court decided *Chambers* under the Privileges and Immunities Clause of Article IV of the Constitution. Plaintiffs argue, however, that history compels the conclusion that the privileges and immunities protected by the Fourteenth Amendment must be identical Hence, they rest their privileges and immunities argument upon the Fourteenth Amendment. It is true that in the *Slaughterhouse Cases,* 83 U.S. 36, 16 Wall. 36, 21 L.Ed. 394 (1873), the U.S. Supreme Court emaciated the Privileges and Immunities Clause of the Fourteenth Amendment to the point of impotence. Constitutional scholars and the plaintiffs believe, however, that the Framers of the Fourteenth Amendment could not have intended its Privileges and Immunities Clause to be so useless. *See, e.g.,* Tribe, Laurence, and Michael C. Dorf, *On Reading the Constitution,* Cambridge: Harvard University Press, 1992, pp. 52-53.

[7] The First Amendment of the U.S. Constitution also gives the citizens a federal right of access to state courts. *See Bill Johnson's Restaurants Inc. v. NLRB,* 461 U.S. 731, 741, 103 S.Ct 2161, 2169 (1983).

[8] In dicta in *Gravinese v. Johns-Manville Corp.,* 324 Pa.Super. 432, 471 A.2d 1233 (1984), the Superior Court said that statutes of limitation

(Continued on following page)

Gelsinger defendants conceded, "the ability to pursue a remedy has been cut short by the statute of limitations." (Memorandum of Law of Defendants Melvin C. Gelsinger, Gale Gelsinger, Esther Gelsinger, and Clarence D. Gelsinger In Response to Plaintiff's Statement of Matters Complained Of, p. 9.) The question is whether this infringement is constitutional.

Under both the Pennsylvania and U.S. Constitutions, the Commonwealth may not infringe a fundamental right unless it satisfies the most stringent standard of constitutional review, namely strict scrutiny. To be constitutional under strict scrutiny, an infringement must be necessary to serve a compelling state interest. *Commonwealth v. Albert*, 563 Pa. 133, 139, 758 A.2d 1149, 1152 (2000). Plaintiffs concede that the state interest here – preventing stale and fraudulent claims – is compelling.

Extinguishing wrongful death and survival claims before discovery of them, however, is not strictly necessary to serve the state interest. The claims can be extinguished

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"pertain to remedies and do not impair fundamental rights." *Id.*, 324 Pa.Super. at 441, 471 A.2d at 1238. Plaintiffs respectfully submit that this is wrong. Significantly, the *Gravinese* Court did not address the Remedies Clause; it looked strictly at the Equal Protection Clause. Similarly, the Court in *Noetzel v. Glasgow Inc.*, 487 A.2d 1372 (Pa.Super. 1985), failed to analyze the Remedies Clause in saying that statutes of limitation do not impair fundamental rights; it simply cited *Gravinese*. The sole case the *Gravinese* Court cited for this proposition really held that defendants do not have a fundamental right to the shelter of a statute of limitation. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945). The issue in *Chase Securities Corp.* was whether a state could constitutionally and retrospectively revoke a statute of limitations after plaintiff's claim had expired. The case had nothing to do with a plaintiff's constitutional right to a remedy.

in the statutory period after they are or should have been discovered, in the same manner as personal injury claims are extinguished. Extinguishing wrongful death and survival claims prior to discovery elevates the state interest over the plaintiffs' fundamental rights, which strict scrutiny prohibits. Balancing the private rights and the state interest by extinguishing wrongful death and survival claims in the statutory period after they should have been discovered is the only way to protect all interests in the equation. Otherwise, the right to a remedy receives no more protection than it would have in the absence of the Pennsylvania Remedies and Due Process Clauses and the U.S. Privileges and Immunities Clause.

Pre-discovery extinguishment is not only unnecessary, but is also bad policy, for it encourages those responsible for wrongful death to conceal their wrongdoing, and motivates wrongful death claimants to file premature, perhaps frivolous litigation before the statute expires. As former Chief Justice O'Brien said in dissent in *Anthony v. Koppers Co. Inc.*, 496 Pa. 119, 126-27, 436 A.2d 181, 185 (1981), the forerunner to *Pastierik*, "On a sheerly practical level, the majority's newly announced principle is likely to encourage the commencement of a rash of law suits filed to protect potential causes of action which are not yet and may never become meritorious. The potential increase in litigation under an extended discovery rule pales by comparison."

In *Ling v. Stillwell*, 732 N.E.2d 1270 (Ind. Ct. App. 2000),[9] Doris Stillwell died on August 1, 1994, while she

[9] Plaintiffs' constitutional argument relies partly on cases from other states because the Pennsylvania Supreme Court has not addressed whether pre-discovery extinguishment of wrongful death and

(Continued on following page)

was a patient at a hospital. In July 1997, her son James learned for the first time that a nurse who had been responsible for Doris was under investigation for murders at the hospital. Although the two-year statute of limitations had already passed, James filed a lawsuit against the hospital to recover for his mother's death, and the Indiana Court of Appeals held that failure to apply the discovery rule to the limitations period would violate James' constitutional right of access to the courts:

> [T]he statute of limitations is unconstitutional, as applied, when "it requires a plaintiff to file a claim before she is able to discover the alleged malpractice and her resulting injury, and, therefore, it imposes an impossible condition on her access to the courts and pursuit of her tort remedy."

Id. at 1274 (citation omitted). *See also Kenyon v. Hammer,* 688 P.2d 961, 979-80 (Ariz. 1984) (Hays, J., concurring) ("In essence, it is my opinion that the right to bring an action in Arizona is, under our Constitution, a fundamental right ... A statute of limitations or repose which abrogates an action for damages even before the action arises or can reasonably be discovered is unconstitutional"). Similarly, courts have held that a statute of limitations that extinguishes a minor's cause of action before he has capacity to file a lawsuit violates his right of access to the courts. *See Strahler v. St. Luke's Hospital,* 706 S.W.2d 7, 11-12 (Mo. 1986). *See also Piselli v. 75th*

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survival claims is constitutional. These cases, however, merely apply standards of constitutional review shared by all states under the federal constitutional law they have in common. Thus, Pennsylvania courts may pay close attention to these cases.

Street Medical, 808 A.2d 508 (Md. 2002); *Weiner v. Wasson,* 900 S.W.2d 316 (Tex. 1995); *Mominee v. Scherbarth,* 503 N.E.2d 717 (Ohio 1986).

Here, the Pennocks had no reason to sue anyone for Danny's death until six years after he died, when they learned that sewage sludge applied to a neighboring farm was the culprit. They filed their lawsuit within two years of that discovery. Failure to afford them the benefit of the discovery rule violates the Remedies and Due Process Clauses of the Pennsylvania Constitution, and independently violates the superior Privileges and Immunities Clause of the U.S. Constitution. The *Pastierik* Court did not consider or rule upon these constitutional questions, so the Commonwealth Court may choose to do so. *See, e.g., Commonwealth v. Franklin,* 172 Pa.Super. 152, 154-155, 92 A.2d 272, 274 (1952) (in which the Superior Court reconsidered an ancient ruling of the Pennsylvania Supreme Court that had not addressed the pertinent constitutional issues).

C. Extinguishing Wrongful Death and Survival Claims against the Commonwealth Prior to Discovery of Them Fails to Satisfy Intermediate Scrutiny

As already noted, the Pennocks' right to sue the Commonwealth is important, but not fundamental. *James,* 505 Pa. at 146-47, 477 A.2d at 1306. Hence, extinguishing their claims against DEP before they discovered them must satisfy intermediate scrutiny. To be constitutional under intermediate scrutiny, an infringement must be substantially related to an important state interest. Again, plaintiffs concede that the state interest here – preventing

stale and fraudulent claims – is important, as the Court held in *James,* 505 Pa. at 148, 477 A.2d at 1307.

The infringement, however, is not substantially related to the state's interest. In *Clark v. Jeter,* 486 U.S. 456 (1988), for example, the U.S. Supreme Court found unconstitutional, under intermediate scrutiny, Pennsylvania's six-year statute of limitations for paternity actions for illegitimate children. The statute was "not substantially related to Pennsylvania's interest in avoiding the litigation of stale or fraudulent claims" because "[i]n a number of circumstances, Pennsylvania permits the issue of paternity to be litigated more than six years after the birth of an illegitimate child." *Id.* at 473-74. Likewise, as Pennsylvania allows personally injury claims to accrue after discovery, preventing wrongful death and survival claims from doing so is not rationally related, let alone substantially related, to the state interest at issue. In this case, the burdens and manner of proving injuries and causation did not change just because Danny's death turned a personal injury claim into wrongful death and survival claims

In *Carson v. Maurer,* for instance, the Supreme Court of New Hampshire found a statute that deprived medical malpractice claimants of the discovery rule except in foreign objects cases to violate equal protection under intermediate scrutiny:

> Under the discovery rule a cause of action does not accrue until the plaintiff discovers or, in the exercise of reasonable diligence, should have discovered both the fact of his injury and the cause

> thereof.[10] . . . The rule is premised on "the manifest unfairness of foreclosing an injured person's cause of action before he has had even a reasonable opportunity to discover its existence. . . . As such, the legislature may not abolish the discovery rule with respect to any one class of medical malpractice plaintiffs.

Carson v. Maurer, 424 A.2d 825, 833 (N.H. 1980). Here, allowing wrongful death and survival claims to accrue after discovery is the only way to give substance to the important right to a remedy.

D. Extinguishing Wrongful Death and Survival Claims Prior to Discovery Even Fails to Satisfy Rational Basis Review

In addition to the constitutional bases already asserted, the Pennocks argue that pre-discovery extinguishment of their claims violates their rights under the Equal Protection Clauses of the Pennsylvania Constitution (PA. CONST. Art. 1, § 26; Art. 3, § 32) and U.S. Constitution (U.S. CONST. Amend XIV, § 1),[11] and under the Due Process Clause of the U.S. Constitution (*Id.*). If this Court finds that the Pennocks' right to a remedy is not fundamental or

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[10] In Danny's case, knowledge of the cause means not only that he died from staph and rotavirus infections, but "who or what caused it." *See Moyer v. Rubright*, 438 Pa. Super. 154, 160, 651 A.2d 1139, 1142 (1994). Prior to then, the Pennocks knew only that there was a death, not that there was a wrongful death.

[11] *Commonwealth v. Albert*, 563 Pa. 133, 138, 758 A.2d 1149, 1151 (2000) ("This Court has held that 'the equal protection provisions of the Pennsylvania Constitution are analyzed . . . under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution' ").

important, then rational basis review applies to all of their constitutional claims, including those under the Remedies, Privileges and Immunities, Due Process, and Equal Protection Clauses.

To be constitutional under rational basis review, an infringement must be rationally related to a legitimate state interest. Rational basis review under the Due Process Clause of the U.S. Constitution specifically requires that litigants have a "meaningful" time, manner, and opportunity to be heard. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S.Ct. 1148, 1158-59 (1982); *Boddie v. Connecticut,* 401 U.S. 371, 378, 91 S.Ct. 780, 786 (1971). Indeed, the whole premise of the constitutionality of statutes of limitation is that they provide parties with a "reasonable" opportunity for pursuing their claims. *Alton's Estate,* 220 Pa. 258, 271-72, 69 A. 902, 907 (1908); *Noetzel v. Glasgow, Inc.,* 338 Pa. Super. 458, 470 (1985). Rational basis review for Equal Protection purposes requires that legislative classifications not be arbitrary. *Commonwealth v. Albert,* 563 Pa. 133, 138, 758 A.2d 1149, 1151 (2000); *Moyer v. Phillips,* 462 Pa. 395, 400-401, 341 A.2d 441, 443 (1975) ("The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced may be treated alike.")

Pre-discovery extinguishment of wrongful death and survival claims fails to satisfy even this minimum level of constitutional scrutiny. Under Due Process analysis, a two-year opportunity to sue is meaningless and unreasonable when plaintiffs do not know the culprit of wrongful conduct. Under Equal Protection analysis, the Commonwealth's legislative distinction between wrongful death

claimants and personal injury claimants is completely arbitrary. The distinction alters the time of accrual based upon whether or not a person dies from his injuries. The notion that death is a definite event that puts plaintiffs on notice to pursue their claims is useless when the identify [sic] of the culprit is "shrouded" in mystery despite autopsies and other investigations. *See Pastierik,* 514 Pa. at 522, 526 A.2d at 326.

In *Moyer v. Phillips,* for example, the Pennsylvania Supreme Court struck down legislation that allowed all tort claims except those for slander or libel to survive the death of the claimant:

> The survival statute divides injured parties into two classes. The first class is composed of all parties who suffer legal injuries other than those to reputation. The second class is composed of those persons who suffer legal injury to reputation. The survival statute assures that all members of the first class will not have an accrued cause of action extinguished by the death of a party, while for the second class, extinguishment in similar circumstances is mandated. . . . No function of the survival statute or of the law of defamation is served by the statute's exception. . . . As it exists today, the exception is arbitrary and bears no relationship to the objective of the statute. Accordingly, it cannot stand.

Moyer, 462 Pa. at 401, 403, 341 A.2d at 443-44, 444-45. *See also Lyons v. Lederle Laboratories,* 440 N.W.2d 769, 771-72 (S.D. 1989) (striking down, under rational basis review, a statutory scheme that tolled a minor's claim until one year after his eighteenth birthday, except for medical malpractice claims, which were extinguished earlier).

Pennsylvania's legislative scheme for the discovery rule (as interpreted in *Partierik*) implicates the Equal Protection Clauses because it creates two classes of injured people in Pennsylvania. People who are injured and live get to apply the discovery rule. People who are injured and die, even from precisely the same injury by precisely the same wrongdoer, do not get to apply the discovery rule. Under *Pastierik,* if Danny had survived the staph and rotaviris infections in 1995 and then discovered the culprit in 2001, he would have been able to sue to recover for his injuries, pain, and suffering; whether he had pursued his claims diligently would have been a jury question. Because he died, his parents are barred from recovering for wrongful death and for the same pre-death injuries that would have been protected by the discovery rule had Danny lived.[12]

E. Even If Pre-Discovery Extinguishment of Wrongful Death and Survival Claims Is Constitutional, It Is Wrong as a Matter of Pennsylvania Law

Even if the *Pastierik* interpretation is constitutional, it is wrong as a matter of Pennsylvania law.[13] A careful

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[12] *See, e.g., Hanebuth v. Bell Helicopter Intl.*, 694 P.2d 143, 147 (Ala. 1984) ("[I]f the discovery rule is not applied to wrongful death actions, a tortfeasor whose conduct has been so grievous as to cause death would be exonerated, while another tortfeasor, guilty of the same conduct except for the fortuity that it merely caused injury, would be held responsible. . . . We will not attribute an intent to adopt such an irrational result to the legislature.")

[13] If pre-discovery extinguishment of plaintiffs' claims is constitutional, plaintiffs concede that this Court is bound to apply *Pastierik*. In that event, plaintiffs make the argument that *Pastierik* is wrong simply to preserve the issue for review by the Pennsylvania Supreme Court.

reading of *Pastierik* reveals that it relied on a prior decision in *Anthony v. Koppers,* 496 Pa. 119, 436 A.2d 181 (1981), wherein the Court created the discovery rule dichotomy between personal injury claims on the one hand and wrongful death and survival claims on the other hand. The plurality opinion in *Anthony* said availability of the discovery rule hinges on the manner of accrual under the relevant statutory language. *Id.,* 496 Pa. at 123-124, 436 A.2d at 183-184. At the time, claims for wrongful death, survival, and personal injury were governed by three separate and different statutes of limitation, with different provisions concerning the time of accrual. Under those circumstances, perhaps it was reasonable to conclude that the General Assembly meant to afford the benefit of the discovery rule to personal injury claimants but not to wrongful death and survival claimants.[14]

By the time of the *Pastierik* holding, wrongful death, survival, and personal injury claims had come to be governed by precisely the same language in precisely the same statute of limitations, namely 42 Pa.C.S.A. § 5524(2). Nonetheless, the *Pastierik* Court affirmed the dichotomy created by the *Anthony* Court. In doing so, it abandoned the *Anthony* approach of examining the manner of accrual under the relevant statutory language and instead based its decision on the policy that death is a definite event putting claimants on notice to pursue their claims. *Pastierik,* 514 Pa. at 522, 526 A.2d 326.

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[14] Moreover, as Justice Larsen observed in his dissent in *Pastierik,* while five justices agreed with the result in *Anthony,* only three of them agreed with the basis for the plurality opinion, *i.e.,* that the discovery rule is unavailable to wrongful death and survival claimants. *Pastierik,* 514 Pa. at 525, 526 A.2d at 327 (Larsen, J., dissenting).

The Pennocks respectfully argue that there is no basis upon which to conclude that by using the same limitation and accrual language for personal injury, wrongful death, and survival claimants, the General Assembly meant to afford the discovery rule to one set of plaintiffs but not to the other two. Likewise, there is no basis upon which to conclude that claims for mysterious personal injuries are tolled prior to death, but that after death, survival actions for those very same injuries are not tolled, even though the mystery remains unsolved. Justice Larsen said all this bluntly in his dissent in *Pastierik* (in which Justice Papadakos joined): "It is absurd to conclude that the legislature would have intended that different rules apply to different causes of action when it included in a single provision the limitation of time for wrongful death, survival and personal injury actions." *Id.*, 514 Pa. at 527, 526 A.2d at 328. Thus, *Pastierik* should be reversed.[15]

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[15] The high courts of other states have acknowledged the fundamental unfairness of pre-discovery extinguishment of wrongful death claims and so have allowed the discovery rule in such cases, even under statutes with stricter accrual language than Pennsylvania's current statute. *See Collins v. Sotka*, 692 N.E.2d 581, 583 (Ohio 1998) (stricter statute provided "[a]n action for wrongful death shall be commenced within two years after the decedent's death"); *White v. Johns-Manville Corp.*, 693 P.2d 687, 690-91 (Wash. 1985) (similar statute provided "Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued"); *Hanebuth v. Bell Helicopter Intl.*, 694 P.2d 143, 144 (Ala. 1984) (stricter statute provided "The action [for wrongful death] shall be commenced within two years after death"). *See also Shaughnessy v. Spray*, 637 P.2d 182, 185-86 (Or.App. 1981) (stricter statute provided wrongful death action must be "commenced within three years of the occurrence of the injury causing the death of the decedent"); *Myers v. McDonald*, 635 P.2d 84 (Utah 1981).

II. The Pennocks' Complaint States a Claim against Rettew Associates and Should Be Reinstated, or Should Be Amended after Discovery

The Pennocks respectfully submit that the trial Court erred as a matter of law when it dismissed their Complaint against Rettew Associates for failure to state a claim. The elements of a claim for negligence are duty, breach, and causation of injury. *Herczeg v. Hampton Township Mun. Auth.*, 766 A.2d 866, 871 (Pa.Super. 2001). "Whether a duty exists under a particular set of facts is a question of law. . . . '[A] duty arises only when one engages in conduct which foreseeably creates an unreasonable risk of harm to others.' . . . 'Whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk and the public interest in the proposed solution.'" *Id.* (citations omitted).

The Pennocks' Complaint inferentially alleges that Rettew Associates had a duty to anyone who could foreseeably be harmed by the sludging process because Rettew was "hired by Richard Lenzi to oversee the sludge process conducted by Ridge Crest Farms and the application of sludge at the Gelsinger farms. . . . " (Complaint p. 7, ¶ 25.) A DEP report attached to the Complaint says, "The whole process was overseen by a consultant retained by Richard Lenzi and Ridge Crest Farms." (Complaint ex. D, p. 2.) In Pennsylvania, independent contractors, including professional engineers, are liable to foreseeable third parties under such conditions. In *Heath v. Huth Engineers Inc.*, 279 Pa.Super. 90, 420 A.2d 758 (1980), for example, an employee of Environmental Utilities Inc. (a sewer construction contractor) was killed in a trench on a project for

the Lancaster Area Sewer Authority (LASA). Huth Engineers Inc. was the "consulting engineer on the sewer project pursuant to a contract between Huth and LASA." *Id.*, 279 Pa.Super. at 91, 420 A.2d at 759. The Superior Court ruled that Huth could be responsible for the employee's death under either a third-party beneficiary theory of contract liability or under a negligence theory of liability per Restatement (Second) of Torts 55 324(a). The Restatement says:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Independent contractors also have a duty in Pennsylvania under Restatement (Second) of Torts § 384, which says:

> One who on behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition while the work is in his charge.

In *Reformed Church of the Ascension v. Theodore Hooven & Sons Inc.*, 764 A.2d 1106 (Pa.Super. 2000), for example, a church hired an independent contractor to repaint portions of a parsonage. Third parties who lived at the

parsonage sued the contractor, alleging injury from lead paint dust the contractor had caused. The Superior Court reversed dismissal of the Complaint on the strength of the duty imposed by § 384 of the Restatement. *Id.*, 764 A.2d at 1111.

By alleging that Rettew contractually oversaw the sludging process, including the application of sludge to Gelsinger Farms, the Pennocks state a claim under the duties covered by both § 324 and § 384 of the Restatement.

Rettew says that as an engineer – a design professional – it had no duty for the safety of third parties who could be harmed by the sludging process. But this is not a case in which an engineer designed a bridge or the structural components of a building, leaving construction and safety to the general and subcontractors. Plaintiffs allege that Rettew, by contact or conduct, assumed responsibility greater than that of a mere design professional. Rettew was hired "to oversee the sludge process conducted by the Ridge Crest Farms and the application of sludge at the Gelsinger farms. . . . " (Complaint p. 7, ¶ 25.) A DEP report attached to the Complaint says a consultant oversaw "the whole process." (Complaint ex. D, p. 2.) By filing preliminary objections, Rettew has conceded these facts for purposes of its demurrer. *Reformed Church of the Ascension,* 764 A.2d at 1109.

Case law clearly indicates that when an engineer, by contract or conduct, assumes responsibility that goes beyond its function as a design professional, it can be held liable to third-parties for breaching a duty to protect their safety, even if the harm is not a product of faulty design. In *Herczeg,* for example, the Superior Court said, "The courts of this Commonwealth have consistently refused to

impose a duty on design professionals to protect workers from hazards on a construction site **unless there was an undertaking, either by contract or course of conduct to supervise or control the construction and/or to maintain safe conditions on the site.**" *Herczeg,* 766 A.2d at 871 (emphasis added); *see also Frampton v. Dauphin Dist. Services Co.,* 436 Pa.Super. 486, 489, 648 A.2d 326, 328 (1994); *Young v. Eastern Engineering and Elevator Co.,* 381 Pa.Super. 428, 434, 554 A.2d 77, 80 (1989) ("It would appear that an architect who, acting as an independent contractor, plans and supervises construction work is under a duty to exercise ordinary care in doing so in order to protect any person who foreseeably and with reasonable certainty may be injured by his failure to do so.") On the engineer's motion to dismiss in *Herczeg,* the trial court gave plaintiffs an opportunity to conduct discovery to establish whether the engineer had undertaken responsibility for safety (a claim plaintiffs eventually abandoned). *Id.* at 869. Here, the Pennocks allege that Rettew assumed such responsibility, but they have not had a chance to conduct discovery to support the assertion.

In summary, then, the Pennocks allege that Rettew owed foreseeably injured neighbors a duty under Restatement (Second) of Torts §§ 324 and 384, and under its assumption of responsibility for the safety of the sledging process by virtue of its contract with Richard Lenzi and Ridge Crest Farms and its course of conduct. The scant information available to plaintiffs before fact discovery reveals that Rettew filed permit applications and reports for Ridge Crest Farms through the time of Danny's death in 1995. (*Id.* pp. 7, 8, ¶¶ 25, 29-30); how much more it did or contracted to do to "oversee" the process remains to be ascertained in discovery. The Complaint alleges breach of

Rettew's supervisory duty by asserting that during the sludging process, defendants oversludged Gelsinger Farms, sludged frozen land into which the sludge could not be incorporated, improperly stored sludge on Gelsinger Farms, failed to mark sludged land or warn neighbors prior to sludging, and allowed Danny to hunt on sludged land in ignorance of the dangers. (*Id.* pp. 8-9, 10-11, ¶¶ 31-36, 41-42, 44, 46-48). Finally, the Complaint alleges that misconduct in the sludging process resulted in Danny's death by exposing him to pathogens in the sludge. (*Id.* pp. 13-14, 15-18, ¶¶ 66-72, 80, 82-88, 90-93.)

On the strength of these allegations, plaintiffs are entitled to conduct discovery concerning Rettew's involvement, just as the plaintiffs did in *Herczeg*. The trial Court may then give plaintiffs leave to amend their Complaint if necessary. Pa.R.C.P. 1028(e), 1033.[16] Determining whether an admittedly involved party assumed responsibility for safety "by contract or course of conduct" necessarily requires discovery.

Conclusion

In summary, because pre-discovery extinguishment of the Pennocks' claims is unconstitutional, the Pennocks respectfully ask this Court to reverse the Orders of October 14 and December 16, 2003, and remand for further proceedings. Because the Pennocks have stated a claim against Rettew Associates, they respectfully ask this Court to reverse the Order of June 30, 2004, either reinstating the Complaint against Rettew outright or, in the alternative,

[16] Without discovery, plaintiffs lacked the information they needed to amend as of course under 1028(c)(1).

giving them time to conduct discovery and then amend pursuant to Pa.R.C.P. 1028(e) and 1033.

Respectfully submitted,

Dated December 14, 2004 /s/ [Illegible]

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APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. ___

RUSSELL PENNOCK AND ANTOINETTE PENNOCK, in their individual capacities and on behalf of the ESTATE OF DANIEL PENNOCK,

Petitioners,

v.

RICHARD V. LENZI AND CARMINE D. LENZI, in their individual capacities and dba RIDGE CREST FARMS, MELVIN C. GELSINGER, GALE GELSINGER, ESTHER GELSINGER, CLARENCE D. GELSINGER, RETTEW ASSOCIATES INC., BERKS COUNTY CONSERVATION DISTRICT, and the COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

Petition for Allowance of Appeal
from the Order of the Commonwealth Court of Pennsylvania, Docket No. 1788 C.D. 2004, affirming the Orders of the Court of Common Pleas, Dauphin County, Docket No. 2003 CV 0848

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Pursuant to Pa.R.A.P. 1112(c), Petitioners Russell and Antoinette Pennock, in their individual capacities and on behalf of the Estate of Daniel Pennock, petition this Honorable Court for allowance of appeal from the Order of the Commonwealth Court, 1788 C.D. 2004, dated September 15, 2005.

Reports of Opinions

The opinion of the Commonwealth Court is dated September 15, 2005, reported at *Pennock v. Lenzi*, ___ A.2d ___, 2005 WL 2233319 (Pa.Cmwlth. 2005), and appended hereto as item 1. The two unreported opinions of the Court of Common Pleas, Dauphin County, are dated June 30, 2004, and October 14, 2003, and are appended hereto as items 2 and 3.

Text and Date of the Order in Question

The Commonwealth Court's Order reads as follows:

> AND NOW, this 15th day of September, 2005, the order of the Court of Common Pleas of Dauphin County in the above-captioned matter is hereby AFFIRMED.

Questions Presented for Review

These are two interrelated questions presented for review:

1. Is the right to a remedy for wrongful death fundamental under the Remedies Clause of the Pennsylvania Constitution (Pa. Const Art. 1, §11), the Due Process Clause of the Pennsylvania Constitution (Pa. Const. Art. 1, § 1), and/or the Privileges and Immunities Clause of the Fourteenth Amendment of the U.S. Constitution (U.S. Const., Amend XIV, § 1)?

2. If the right to a remedy for wrongful death is fundamental, does failure to apply the discovery rule to the pertinent statute of limitations infringe the right

without satisfying strict scrutiny, thereby rendering the infringement unconstitutional?

Statement of the Case

Seventeen-year-old Danny Pennock died in April 1995 after a two-week hospitalization with mysterious staphylococcus aurea and rotavirus infections. For the next six years, Danny's parents, Russell and Antoinette Pennock, had no idea how Danny had contracted the infections. It is a reasonable inference from their Complaint, which was dismissed on demurrer, that the Pennocks' ignorance was not due to a lack of diligence.

In February 2001, the *Reading Eagle* published an article on the topic of sewage sludge, which is sludge derived from municipal sewage treatment systems and from commercial, industrial, and residential septic and holding tanks. 25 Pa. Code § 271.1. Under the "beneficial use" program of the U.S. Environmental Protection Agency, sewage sludge is spread as fertilizer on farmland and mine reclamation sites in Pennsylvania. The *Reading Eagle* article explored whether the land application of sewage sludge is properly regulated and safe. It contained information from EPA microbiologist Dr. David L. Lewis on the life-threatening pathogens found in sewage sludge. It also described the illness and death of an 11-year-old boy, Tony Behun, who died after exposure to sewage sludge in Rush Township, Pennsylvania. Tony's tragic illness and eventual death were similar to Danny's.

After reading the *Reading Eagle* article, the Pennocks contacted Dr. Lewis, who reviewed Danny's medical records. Dr. Lewis opined that Danny contracted the rotavirus and staph infections from his prolonged exposure

to the dust and fumes from Class B sewage sludge that had been spread at a farm across the street from the Pennocks' residence from 1988 to 1995. As alleged in the Complaint:

> The lime stabilization process used to treat Class B sewage sludge prior to land application has the effect of, when the lime dust is inhaled, opening and exposing an individual's lungs in the mucus membrane and the mouth and throat areas so that the individual is more susceptible to these pathogens. As a result, skin and respiratory problems develop, such as skin irritation, difficulty in breathing, congestion, burning lungs, coughing and sinusitis, and from these, the infections occur.

It was from Dr. Lewis' analysis and the reported symptoms experienced by Tony Behun that the Pennocks first became aware of the link between sewage sludge and their own son's death.

Less than two years after publication of the *Reading Eagle* article, the Pennocks filed their wrongful death complaint[1] in the Dauphin County Court of Common Pleas against the sludgers who spread the sludge, the farmers who owned the property that was sludged, an engineering firm hired by the sludgers, and two government offices responsible for regulating sludgers in Pennsylvania. By Order and Opinion of October 14, 2003, the trial court granted a demurrer, dismissing the complaint as to the

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[1] The Pennocks' Complaint also contains a survival claim. In the lower courts, the Pennocks argued that the right to a remedy for survival claims is fundamental. The Pennocks have decided to drop this claim for the sake of narrowing the issues for resolution by this Court.

sludgers, farmers, and one of the government offices on the ground that the two-year statute of limitations at 42 Pa.C.S.A. § 5524(2) had expired in April 1997, two years after Danny's death. Relying on this Court's opinion in the case of *Pastierik v. Duquesne Light Co.*, 514 Pa. 517, 526 A.2d 323 (1987), the trial court said the Pennocks could not invoke the discovery rule to toll the statute of limitations for wrongful death, even though they were blamelessly ignorant of the culprit during the two-year period. Then by Order of June 30, 2004, the trial court granted another demurrer, dismissing the complaint against the engineering firm for failure to state a claim, and declining to give the Pennocks a chance to restate that claim, opining that restatement would be futile in light of the court's earlier ruling on the statute of limitations.

Following the entry of a determination of finality by the trial court in July 2004, the Pennocks appealed to the Commonwealth Court of Pennsylvania. Their primary argument was that the right to a remedy for wrongful death is fundamental under the Remedies Clause of the Pennsylvania Constitution (Pa. Const. Art. 1, § 11), the Due Process Clause of the Pennsylvania Constitution (Pa. Const. Art. 1, § 1), and the Privileges and Immunities Clause of the Fourteenth Amendment of the U.S. Constitution (U.S. Coast., Amend XIV, § 1).[2] Extinguishing the remedy before discovery of the culprit is reasonably possible infringes the remedy. Such infringement fails to

[2] The Pennocks also asserted that the right to a remedy for wrongful death is protected by the Equal Protection Clauses of the Pennsylvania and U.S. Constitutions, and by the Due Process Clause of the U.S. Constitution. Again for the sake of narrowing the issues for resolution by this Court, the Pennocks have dropped these arguments.

satisfy strict scrutiny, rendering the infringement unconstitutional.

The Commonwealth Court rejected these arguments. It held that the right to a remedy for wrongful death is not fundamental under either the Pennsylvania or U.S. Constitutions. Following *James v. SEPTA*, 505 Pa. 137, 477 A.2d 1302 (1984), the Court found the right to a remedy to be important, and so applied intermediate scrutiny. The Court concluded that extinguishing wrongful death claims before plaintiffs know whom to sue satisfies intermediate scrutiny because it is "reasonably related to serving the legitimate state interest of preventing a plaintiff from sleeping on his rights to the detriment of the defendant."[3]

Statement of the Reasons for Allowance of an Appeal

There are two special and important reasons for allowing this appeal under Pa.R.A.P. 1114. First, it presents this Court with an issue of first impression. While the Court has previously ruled that the discovery rule does not apply to the statute of limitations for wrongful death claims, it has never ruled whether the right to a remedy for wrongful death is fundamental under the Remedies and Due Process Clauses of the Pennsylvania Constitution or under the Privileges and Immunities Clause of the Fourteenth Amendment of the U.S. Constitution. Rather, the Court engaged only in statutory interpretation when it

[3] Because it affirmed dismissal of the Complaint under the statute of limitations, the Court did not reach the issue of whether the Complaint states a cause of action against the engineering firm.

decided *Pastierik* and subsequent cases. *See Molineux v. Reed*, 516 Pa. 398, 532 A.2d 792 (1987); *Symbula v. Johns-Manville Corporation*, 514 Pa. 527, 526 A.2d 328 (1987).

Second, the Commonwealth Court's conclusion that there is no fundamental right to a remedy for wrongful death is "not in accord with applicable decisions of the Supreme Court of Pennsylvania or the Supreme Court of the United States." Pa.R.A.P. 1114, Note (1). In *Kelly v. Brenner*, 317 Pa. 55, 59, 175 A. 845 (1934) this Court said the rights under the Remedies Clause are "fundamental rights which should not be infringed upon, unless no other course is reasonably possible. In *James v. SEPTA*, 505 Pa. at 146-47, this Court held that the right to a remedy against the Commonwealth is important but not fundamental only because it is qualified by the second sentence of Art. 1, § 11, which gives the General Assembly power to prescribe the metes and bounds of cases against the Commonwealth. This inferentially means that the right to a remedy against private wrongdoers is fundamental because the second sentence of Art. 1, § 11 does not qualify the first sentence concerning private claims. Neither *Kelly* nor *James* involved wrongful death claims. However, this Court has specifically and repeatedly held that the right to a remedy for damage to reputation is fundamental under both the Remedies and Due Process Clauses of the Pennsylvania Constitution, and that strict scrutiny therefore applies to any infringement of such remedy. *See Hatchard v. Westinghouse Broadcasting Co.*, 516 Pa. 184, 193-95, 532 A.2d 346 (1987); *Moyer v. Phillips*, 462 Pa. 395, 400, 341 A.2d 441 (1975). Because life is equipollent with reputation under these clauses, a remedy for damage to life – i.e., a wrongful death claim – must be a fundamental right too.

As for the Privileges and Immunities Clause of the U.S. Constitution, the Commonwealth Court's ruling is at odds with *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907), in which the Court said, "The right to sue and defend in the courts is the alternative to force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship."

Respectfully submitted,

Dated October 3, 2005 /s/ [Illegible]

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Attorneys for Petitioners

APPENDIX C

RUSSELL PENNOCK AND ANTOINETTE PENNOCK, in their individual capacities and on behalf of the ESTATE OF DANIEL PENNOCK	: IN THE COURT OF COMMON PLEAS : DAUPHIN COUNTY, PENNSYLVANIA
Plaintiffs,	: NO. 2003 CV 848 CV
V.	: CIVIL ACTION – LAW
RICHARD V. LENZI and CARMINE D. LENZI, in their individual capacities and D/B/A RIDGE CREST FARMS, MELVIN C. GELSINGER, GALE GELSINGER, ESTHER GELSINGER, CLARENCE D. GELSINGER, RETTEW ASSOCIATES, INC., BERKS COUNTY CONSERVATION DISTRICT, AND THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:
Defendants.	: JURY TRIAL DEMANDED

NOTICE

(Filed [illegible])

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims

set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Dauphin County Lawyer Referral Service
Dauphin County Courthouse
213 N. Front Street
Harrisburg, PA 17101
(717) 232-7536

NOTICIA

Le Han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted tiene viente (20) dias de plazo al partir de la facha de la demanda y la notificacion. Usted debe presentar una apariencia escrita o en Persona o por abogado y archivar en la corte en forma escrita sus defensas o sus objectiones a las demandas encontra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede entrar una orden contra usted sin previo aviso o notificacion y por cualquier queja o alivio que es pedido en la peticion de demanda. Usted puede perder dinero o sus propiedades o otros derechos importantes para usted.

LLEVE ESTA DEMANDA A UN ABODAGO INMEDIATAMENTE. SI NO TIENE ABOGADO O SI NO TIENE EL DINERO SUFICIENTE DE PAGAR

TAL SERVICIO, VAYA EN PERSONA O LLAME POR TELEFONO A LA OFICINA CUYA DIRECCION SE ENCUENTRA ESCRITA ABAJO PARA AVERIGUAR DONDE SE PUEDE CONSEGUIR ASISTENCIA LEGAL.

Dauphin County Lawyer Referral Service
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213 N. Front Street
Harrisburg, PA 17101
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RUSSELL PENNOCK AND ANTOINETTE PENNOCK, in their individual capacities and on behalf of the ESTATE OF DANIEL PENNOCK	: IN THE COURT OF COMMON PLEAS : DAUPHIN COUNTY, PENNSYLVANIA
Plaintiffs,	: NO. 2003 CV 848 CV
V.	: CIVIL ACTION – LAW
RICHARD V. LENZI and CARMINE D. LENZI, in their individual capacities and D/B/A RIDGE CREST FARMS, MELVIN C. GELSINGER, GALE GELSINGER, ESTHER GELSINGER, CLARENCE D. GELSINGER, RETTEW ASSOCIATES, INC., BERKS COUNTY CONSERVATION DISTRICT, AND THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:
Defendants.	: JURY TRIAL DEMANDED

COMPLAINT

(Filed [illegible])

PARTIES

1. Plaintiffs, Russell and Antoinette Pennock are adult individuals, wife and husband, who are Pennsylvania residents with their primary address being 304 Bunker Hill Road, Robesonia, Beaks County, Pennsylvania.

2. Defendant, Richard V. Lenzi ("Richard Lenzi"), is an adult individual who is a resident of the Commonwealth of Pennsylvania. The address of his primary residence is yet unknown. Richard Lenzi has been sued individually and as a result of his doing business as Ridge Crest Farms, a Pennsylvania Partnership with its principal place of business located at 3008 Germantown Pike, Fairview Village, Montgomery County, Pennsylvania.

3. Defendant, Carmine D. Lenzi ("Carmine Lenzi"), is an adult individual who is a resident of the Commonwealth of Pennsylvania. The address of his primary residence is yet unknown. Carmine Lenzi is being sued in his individual capacity and as a result of his doing business as Ridge Crest Farms, a Pennsylvania Partnership with its principal place of business at 3008 Germantown Pike, Fairview Village, Montgomery County, Pennsylvania.

4. Defendant, Rettew Associates, Inc., is a Pennsylvania Corporation with a principal office located at 3020 Columbia Avenue, Lancaster, Lancaster County, Pennsylvania.

5. Defendant, Melvin C. Gelsinger, is an adult individual who is a resident of the Commonwealth of Pennsylvania with his primary residence located at 361 Bunker Hill Road, Robesonia, Berks County, Pennsylvania.

6. Defendant, Gale Gelsinger, is an adult individual who is a resident of the Commonwealth of Pennsylvania with his primary residence located at 361 Bunker Hill Road, Robesonia, Berks County, Pennsylvania.

7. Defendant, Clarence D. Gelsinger, is an adult individual who is a resident of the Commonwealth of Pennsylvania with his primary residence located at the ECC Retirement Village, 440 East Lincoln Avenue, Myerstown, Lebanon County, Pennsylvania.

8. Defendant, Esther Gelsinger, is an adult individual who is a resident of the Commonwealth of Pennsylvania with her primary residence located at the ECC Retirement Village, 440 East Lincoln Avenue, Myerstown, Lebanon County, Pennsylvania.

9. Defendant, Berks County Conservation District, is a local governmental agency that works in conjunction with, and under the direction of, the Commonwealth of Pennsylvania Department of Environmental Protection and the Environmental Protection Agency. Its principal place of business located in the Berks County Agricultural Center, 1238 County Welfare Road, P O Box 520, Leesport, Berks County, Pennsylvania.

10. Defendant, Commonwealth of Pennsylvania, Department of Environmental Protection, is a state governmental agency which falls under the Governor's jurisdiction with its executive offices at Sixteenth Floor,

Rachel Carson State Office Building, P.O. Box 2063, Harrisburg, Dauphin County, Pennsylvania.

JURISDICTION AND VENUE

11. Jurisdiction and venue is properly vested with this court as at least one of the Defendants has its principal place of business in this jurisdiction and some of the events which resulted in this accident occurred within this jurisdiction.

12. The matter in controversy exceeds the $35,000 limit for mandatory arbitration

FACTS

The Permit to Sludge:

13. On September 25, 1987, the Department of Environmental Resources ("DER") (now known as the Department of Environmental Protection ("DEP")) advised Richard Lenzi that he would be granted permit number 603014 for the "operation of the processing or disposal facility for sewage sludge disposal." The permit was granted to Richard Lenzi doing business as Ridge Crest Farms. A true and correct copy of the permit is attached hereto and made part of this document as Exhibit "A."

14. Carmine Lenzi is the owner of the farm on which the "processing or disposal facility ("facility") is located. Carmine Lenzi is a partner in Ridge Crest Farms, the entity running the facility on said farm.

15. Permit 603014 granted Richard Lenzi license to operate the processing of disposal facility for sewage

sludge disposal at the Gelsinger Farm, a farm situated across the street from the Pennock residence.

16. Richard Lenzi and Ridge Crest Farms utilized the Digestion method to treat the sludge.

17. Melvin C. Gelsinger, Gale Gelsinger, Clarence D. Gelsinger, and Esther Gelsinger signed their consent for sludge to be applied to the Gelsinger farm by Richard Lenzi D/B/A Ridge Crest Farms.

18. According to the materials accompanying the permit, the sludge to be applied to the Gelsinger farm would originate from the Downingtown Sewage Treatment Plant.

19. Under the terms of the permit, requirements for applying the sludge included, but were not limited to, being applied in thin layers to prevent pooling or standing accumulation; to be turned over or incorporated within twenty-four (24) hours of application; the sludge was not to be applied during periods of rain, to saturated ground, or ground which is covered with snow or is frozen; sludge was not to be applied within fifty (50) feet or property lines or two-hundred (200) feet of an occupied dwelling; and to avoid applying sludge in quantities which would result in run-off, vector, or odor problems.

20. In order to maintain the permit, Richard Lenzi and Ridge Crest Farms, were subjected to several reporting and testing requirements, including monthly, yearly, and quarterly reports and yearly testing, in which the appliers themselves, not the DER, were to perform such tests.

21. On April 9, 1988, new regulations promulgated by the DER with regard to sludge processing and application went into effect.

22. Richard Lenzi was advised of these regulations and resulting changes to his business in a letter dated April 11, 1988, a true and correct copy of which is attached hereto and made part of this document as Exhibit "B."

23. As a result of these regulations, Richard Lenzi would have to submit operating reports, obtain commercial liability insurance, and, as Richard Lenzi and Ridge Crest Farms used the digestion method for treating the sludge, they would be required to test the digestion process on a quarterly basis or more often if necessary. The results from the self-tests on the sludge were to be submitted to the DER.

24. The new regulations set the expiration date for Lenzi's permit as of April 9, 1993.

25. Rettew Associates, a consulting company hired by Richard Lenzi to oversee the sludge process conducted by Ridge Crest Farms and the application of sludge at the Gelsinger farms, prepared and submitted an application to renew Richard Lenzi and Ridge Crest Farm's permit for sludge treatment and application.

26. On October 14, 1993, Richard Lenzi and Ridgecrest Farm's application for permit renewal for the sludge facility and its application at the Gelsinger farm was approved. The modification issued to renew the permit stated that the facility was located on the Gelsinger farm, a farm consisting of approximately 287.43 acres. A true and correct copy of the modification is attached hereto and made part of this document as Exhibit "C."

27. The modifications for the renewal of permits stipulated that "only sludge generated by the Downingtown area Regional WTF may be applied to the site." Ridge Crest Farms could not apply sludge generated from any other facility without written "permit modification" approved and issued by the DER.

28. The new permit does not expire until April 13, 2003.

29. According to the annual operations report submitted by Richard Lenzi and Ridge Crest Farms, under the signature of Michael S. Mulds, P.E. of Rettew Associates, Gelsinger farms was receiving sludge applications five (5) times a week to ten (10) designated fields, covering approximately three-hundred (300) acres starting in 1988.

30. The permit was granted for the application of sludge to two (2) farms, both Ridge Crest Farms and the Gelsinger farm. According to the annual reports filed by Ridge Crest Farms, under the signature of Michael Mulds of Rettew Associates, however, the total sludge was applied only to the Gelsinger farm.

31. In 1991, 1,406.40 tons of Class B sewage sludge was applied to the Gelsinger farm by Richard Lenzi doing business as Ridge Crest Farms.

32. In 1992, 1,431.83 tons of Class B sewage sludge was applied to the Gelsinger farm by Richard Lenzi doing business as Ridge Crest Farms.

33. In 1993, 1,548.66 tons of Class B sewage sludge was applied to the Gelsinger farm by Richard Lenzi doing business as Ridge Crest Farms.

34. In 1994, 1,234.05 tons of Class B sewage sludge was applied to the Gelsinger farm by Richard Lenzi doing business as Ridge Crest Farms.

35. In 1995, 1,400.69 tons of Class B sewage sludge was applied to the Gelsinger farm by Richard Lenzi doing business as Ridge Crest Farms.

36. In 1995, sewage sludge was allegedly only applied to the Gelsinger farm for three (3) months. The tonnage of Class B sewage sludge that was applied to the Gelsinger farm by Richard Lenzi d/b/a Ridge Crest Farms for that period broke down to 653.14 tons applied in January, 139.47 tons applied in February, and 598 tons applied in March.

The Sludge and its Regulations:

37. Richard Lenzi and Ridge Crest Farms applies Class B sewage sludge to the Gelsinger farm.

38. In accordance with 40 C.F.R. part 503.32, until the repeal in August of 1999, Class B sludge was required to be tested, through a self-test method by the appliers, for pathogens at either the time of use or at the time of disposal.

39. After August of 1999, and the repeal of part 503.32, Class B sludge was to be treated through the process of lime stabilization only when used for land application.

40. Under the DEP regulations, as applied to those processing or applying Class B sewage sludge to farmland, sludge that was prepared for application but could not be

spread due to the weather was required to be taken to landfills, not held at the facility to be applied at a later time. Likewise under the DEP's regulations, if the farm experienced processing problems because of machinery malfunctions and the sludge could not be applied, the sludge was again to be taken to a landfill, not held at the facility for later application.

41. On March 24, 1988, Ridge Crest Farms and Richard Lenzi were cited for applying sludge to frozen ground in violation of 25 Pa. Code §275.304. A true and correct copy of the violation is attached hereto and made a part of this document as Exhibit "D."

42. On April 15, 1988, Ridge Crest Farms and Richard Lenzi were cited for storing the sludge on site instead of transferring the sludge to a landfill and disposing of it in violation of 25 Pa. Code §275.204. A true and correct copy of the violation is attached hereto and made a part of this document as Exhibit "E."

43. The DEP's regulations, as applied to those who processed and applied Class B sewage sludge to farm fields, required that adjacent land owners be notified at least thirty (30) days in advance of the date that the land application of sludge was to begin.

44. Neither the Lenzis, the Gelsingers, nor Ridge Crest Farms ever provided notice to the Pennocks, or other neighbors, that sludging was to begin on the adjacent farm.

45. Under the DEP's regulations of the land application of Class B sewage sludge, it was required that workers who spread the sludge take state certification courses.

46. On March 7, 1990, Ridge Crest Farms and Richard Lenzi were cited for failing to incorporate the sludge into the soil within the regulated twenty-four (24) hour period in violation of 25 Pa. Code §275.303 (what is now 25 Pa. Code §271.913(5)(g)(1)). A true and correct copy of the violation is attached hereto and made a part of this document as Exhibit "F."

47. Contrary to the Rules and Regulations, the Gelsingers permitted Plaintiff Russell Pennock and his sons Daniel and Dario Pennock to hunt on the farmland even after sewage sludge had been recently applied. Under regulations adopted by the Commonwealth of Pennsylvania and upheld by the DEP, public access to land with a low potential of public exposure is to be restricted for thirty (30) days following application of the sludge.

48. The Gelsingers, the Lenzis, and Ridge Crest Farms failed to mark the land as an area to which sewage sludge was being applied, failed to notify the neighbors that such application of sludge was going to be made, and failed to restrict the use or access to the farm land for any period of time during the years that sludge was applied.

Failure of DEP to Properly Regulate:

49. DEP is the governmental agency with the authority to regulate the land application of sewage sludge.

50. As part of its responsibilities in regulating this industry, the DEP is to collect reports, including but not limited to daily and yearly reports, from each facility that processes or disposes of sewage sludge.

51. Further, as the regulatory authority for the sewage sludge industry, the DEP is to make spot inspections of the facilities and the soil to which the sludge has been applied.

52. In addition, the DEP, as a regulatory authority for the sewage sludge industry, is to require testing of the soil to determine that levels of the toxins incorporated into the soil through the sludge process do not exceed certain specified and regulated levels.

53. The DEP was charged with the responsibility of ensuring that the land application of sewage sludge, as a dangerous activity, is conducted properly so as not to put human life at risk.

54. To properly regulate, the DEP should have ensured that areas of farms to receive the land application of sewage sludge was properly marked in accordance with the regulations, that notice was properly made in accordance with the regulations, that the sludge was properly stabilized prior to sludging in accordance with the regulations, and that the sludge was applied in accordance with the regulations.

55. The DEP failed to perform its regulatory duties by failing to ensure that reporting requirements were followed, by failing to analyze the reports that they received, by failing to perform spot inspections on the sites that receive sewage sludge, and by failing to ensure that proper notice and markings were made for farms to receive the land application of sewage sludge.

56. Further, the DEP has adopted faulty regulations that were enacted by the EPA without proper testing conducted prior to enactment and without proper oversight investigations conducted by the U.S. Inspector

General's Office and the National Research Council have found that the regulations promulgated with regard to the land application of sewage sludge are inadequate and ineffective, and, further, have been improperly enforced, finding that there is not enough personnel assigned to the regulation of this industry to be effective.

57. As a result, faciLities owned by the Lenzis and operated under the name of Ridge Crest Farms have committed violations that have gone undetected and caused a dangerous physical hazard to the community surrounding the farm.

Daniel's Illness and Death:

58. On March 15, 1995, Daniel Pennock was a healthy teenage boy playing basketball at his home.

59. On March 16, 1995, Daniel noticed the first symptoms of his illness – he began to experience a sore throat.

60. The next day, March 17, 1995 the symptoms progressed and became more severe (the sore throat became more severe and he began experiencing headaches) and Daniel was required to stay home from school.

61. By March 18, 1995, Daniel was now experiencing a fever of 103 degrees, and he continued to have a sore throat and headaches.

62. On March 19, 1995, Daniel's parents, the Plaintiffs Russell and Antoinette Pennock, admitted Daniel to the ICU of their local hospital. At the time of admission, the ICU doctors required that cultures be taken of Daniel's throat.

63. On March 20, 1995, as a result of the cultures taken the previous day, it was determined that Daniel suffered from, and was admitted to the hospital with, staphylococcus aureus ("staph").

64. On March 20, 1995, due to this staph infection, Daniel's condition continued to become more severe at an alarming rate. Daniel was ultimately intubated due to his difficult), in breathing caused by perforations that had developed in his lungs as a result of the staph infection.

65. On April 1, 1995, two weeks after first noticing the initial symptoms of the staph infection, Daniel Pennock died in the hospital.

66. Upon analysis of Daniel Pennock's medical records, it was determined that Daniel had contracted both a rotavirus and staph.

67. The effects from the combination of the two lead to Daniel's death.

68. Dr. David L. Lewis ("Dr. Lewis"), an expert in the field of pathogens and land application of sewage sludge and also an EPA scientist, reviewed Daniel's medical records and determined that the rotavirus and staph infection found in Daniel were contracted from his prolonged exposure to the dust and fumes emitted from the pathogens found in Class B sewage sludge.

69. According to Dr. Lewis, the rotavirus and staph are contracted through either skin contact or through breathing dust particles and irritating gases emitted from the sludge.

70. The lime stabilization process used to treat Class B sewage sludge prior to land application has the effect of,

when the lime dust is inhaled, opening and exposing an individual's lungs in the mucus membrane and the mouth and throat areas so that the individual is more susceptible to these pathogens.

71. As a result, skin and respiratory problems develop, such as skin irritation, difficulty in breathing, congestion, burning lungs, coughing and sinusitis, and from these, the infections occur.

72. According to Daniel Pennock's medical records, he did develop such an infection which progressed to the point that holes developed within Daniel's lungs causing great difficulty in breathing, and, ultimately, his death.

Discovery of the Cause of Daniel's Death

73. The Plaintiffs first became aware of the dangers associated with exposure to sewage sludge in February of 2001.

74. On February 25, 2001, the Reading Eagle published several articles on the topic of sewage sludge and the issue of whether its application to farm fields is property regulated and safe. *See Articles*, true and correct copies of which are collectively attached hereto and made part of this document as Exhibit "G".

75. In these articles, many people were interviewed regarding the risk that the land application of sewage sludge posed to humans.

76. Dr. Lewis was one of the experts interviewed.

77. The articles included Dr. Lewis' opinion that a teenage boy's death, Tony Behun who died at age 11, was caused in part, if not solely, by his exposure to sewage

sludge. His death occurred in Centre County, Pennsylvania.

78. It was from Dr. Lewis' analysis and the reported symptoms experienced by Tony Behun that the Plaintiffs first became aware of the link between sewage sludge and their son's death.

COUNT I

RUSSELL AND ANTOINETTE PENNOCK V. RICHARD V. LENZI and CARMINE D. LENZI, in their individual capacities and D/B/A RIDGE CREST FARMS, MELVIN C. GELSINGER, GALE GELSINGER, ESTHER GELSINGER, CLARENCE D. GELSINGER, RETTEW ASSOCIATES, INC., BERKS COUNTY CONSERVATION DISTRICT, AND THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

WRONGFUL DEATH

79. Plaintiff hereby incorporates by reference the allegations set forth in paragraphs 1 through 69 as if fully set forth herein.

80. As a result of the acts and omissions of the Defendants named herein, Decedent contracted a staph infection which resulted in his painful death on April 1, 1995, following the quick and immediate onset of this disease and his painful death.

81. Plaintiffs bring this action on behalf of the beneficiaries of Daniel Pennock's estate under and by virtue of the Wrongful Death Act, 42 Pa. C.S.A. § 8301 ("Wrongful Death Act beneficiaries"), the applicable rules of Civil Procedure and case law.

82. As a result of the negligent acts and omissions of the Defendants and their predecessors, the Decedent was caused great injuries resulting from his illness and in his subsequent death creating an entitlement to damages by the Wrongful Death Act beneficiaries.

83. The Plaintiffs claim all administrators' expenses recoverable under the Wrongful Death Act including, but not limited to, damages for hospital, medical, funeral, and burial expenses and expenses of administration necessitated by the illness that caused Decedent's death.

84. On behalf of the Wrongful Death Act beneficiaries, the Plaintiffs claim damages for monetary support that the Decedent would have provided to said beneficiaries during their lifetime.

85. On behalf of the Wrongful Death Act beneficiaries, the Plaintiffs claim damages for services that would have been provided, or which could have been expected to have been performed, in the future by Decedent.

86. On behalf of the Wrongful Death Act beneficiaries, the Plaintiffs claim damages for the loss of companionship, comfort, society, guidance, solace, and protection of Decedent.

87. On behalf of the Wrongful Death Act beneficiaries, the Plaintiffs claim damages for all pecuniary losses suffered by said beneficiaries.

88. On behalf of the Wrongful Death Act beneficiaries, the Plaintiffs claim damages for the full measure of damages allowed under the Wrongful Death Act and the case law interpreting said Act.

WHEREFORE, Plaintiffs, Russell and Antoinette Pennock, as the legal representatives for the Estate of Daniel Pennock, claim damages in excess of $35,000, and in excess of the prevailing arbitration limits under the Wrongful Death Act, from Defendants and their predecessors.

COUNT II

RUSSELL AND ANTOINETTE PENNOCK V. RICHARD V. LENZI and CARMINE D. LENZI, in their individual capacity and D/B/A RIDGE CREST FARMS, MELVIN C. GELSINGER, GALE GELSINGER, ESTHER GELSINGER, CLARENCE D. GELSINGER, RETTEW ASSOCIATES, INC., BERKS COUNTY CONSERVATION DISTRICT, AND THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

SURVIVAL ACTION

89. Plaintiffs hereby incorporate by reference the allegations set forth in paragraphs 1 through 79 as if fully set forth herein.

90. As a result of the acts and omissions of the Defendants and their predecessors, the Decedent was caused to suffer a grave illness, and resulting injuries, causing his death and creating an entitlement to damages by his beneficiaries under the Survival Act, 42 Pa. C.S.A. § 8302 et sec. [sic] ("Survival Act beneficiaries"), the applicable rules of Civil Procedure, and case law.

91. On behalf of the Survival Act beneficiaries, the Plaintiffs claim loss of earnings and economic loss to Decedent's estate, including but not limited to, Decedent's total estimated future earning power, in terms of regular

income, retirement, and social security income, less the cost of personal maintenance, as a result of Decedent's death.

92. On behalf of the Survival Act beneficiaries, the Plaintiffs claim damages for the pain, suffering, and inconvenience endured by Decedent prior to his death, including but not limited to, physical pain and suffering, mental pain and suffering, and the fright and mental suffering attributed to the period prior to the Decedent's death.

93. The Estate claims the full measure of damages under the Survival Act and the case law interpreting said act.

WHEREFORE, Plaintiffs Russell Pennock and Antoinette Pennock, as legal representatives for the Estate of Daniel Pennock, claim damages in excess of $35,000, and in excess of the prevailing arbitration limits under the Survival Act from the Defendants and their predecessors.

Respectfully submitted,

SMIGEL, ANDERSON & SACKS

/s/ Susan M. Zeamer

Date: 2/21/03

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Susan M. Zeamer, Esquire,
ID 82023
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Attorneys for Plaintiffs

VERIFICATION

I, Russell Pennock, Plaintiff in the foregoing Complaint, verify that I am the legal representative of the Estate of Daniel Pennock, deceased, and that the facts and/or statements contained therein are true and correct to the best of my knowledge, information and belief. I understand that false statements therein are made subject to the penalties of 18 Pa.C.S. §4904, relating to unsworn falsification to authorities.

Date: 2-13-03 /s/ Russell Pennock

Russell Pennock, Plaintiff